

THE  
INSTITUTIONS  
OF THE  
LAW  
OF  
*Scotland.*

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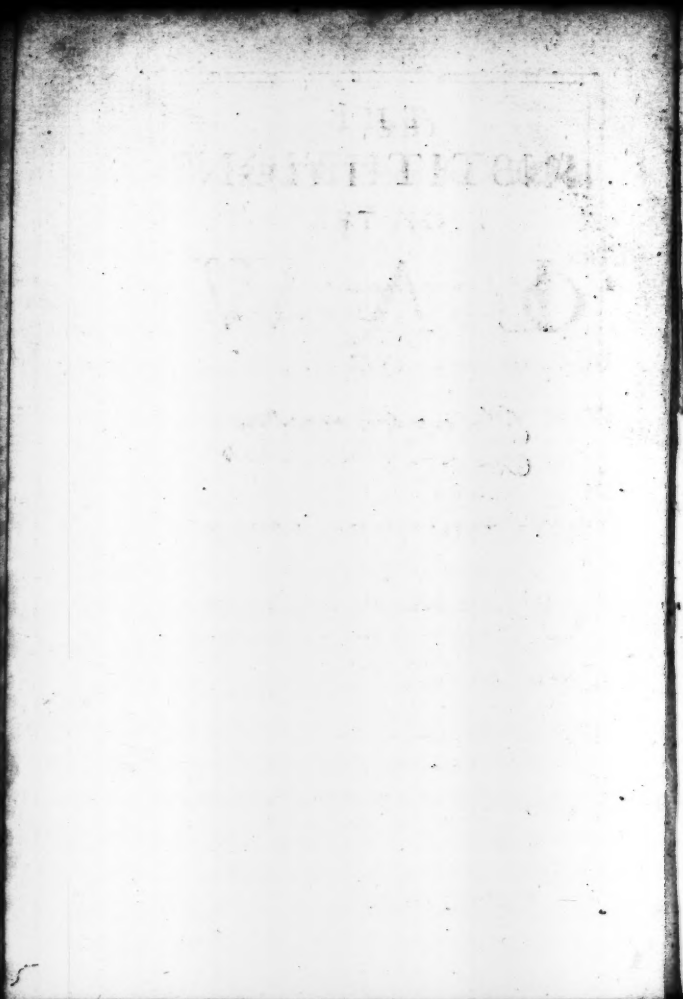
By Sir *GEORGE MACKENZIE*  
of *Rosehaugh*,  
His late Majesty's Advocate.

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With an Alphabetical Explanation  
of the most difficult Scots Words.

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*L O N D O N,*  
Printed for *Andrew Bell* and *Jonas Luntley*, at the  
Pestle and Mortar over against the Horse-  
Shoe-Tavern in *Chancery-Lane*. 1694.





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THE  
INSTITUTIONS  
Of the LAW of  
SCOTLAND.

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BOOK I.

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TITLE I.

*Of LAWS in General.*

**J**USTICE, is a constant and perpetual Will, and Inclination to give every Man what is due to him. Justice.

LAW, is the Science which teacheth Law.  
us to do Justice.

This Law, in a large acceptation, is Division divided into the Law of Nature, Law of of Law. Nations, and the Civil and Municipal Law of each particular Country.

B

The

## Of Laws in general.

Book I.



The *Law of Nature* comprehends those *Dictates* which *Nature* hath taught all living *Creatures*, Instances whereof are *Self-defence*, *Education of Children*; and generally, all those common *Principles*, which are common to *Man and Beasts*; and this is rather *innate Instinct*, than *positive Law*.

Law of Nations.

The *Law of Nations* is peculiar to *Mankind only*, dictated by *right Reason*, and is divided into the *Original* and *primary Law of Nature*, that flows from the *first and purest Principles of right Reason*; such as *Reverence to GOD*, *Respect to our Country*, and *Parents*. And the *secondary*, and *consequential Law of Nature*, consisting of these general *Conclusions*, in which ordinarily all *Nations* agree, and which they draw by way of necessary consequence, from those *first Principles*. And under this part of the *Law of Nations*, are comprehended, the *Obligations* arising from *Promises*, or *Contracts*; the *Liberties of Commerce*, the *Ransoming of Prisoners*, *Security of Ambassadors*, and the like.

Municipal Law.

*Civil*, or *Municipal Laws*, are the particular *Laws and Customs of every Nation*, or *People*, who are under one *Sovereign Power*.

The

## Of Laws in general.

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The *Romans* having studied with great *Tit. I.*  
 exactness the Principles of Equity and  
 Justice, their Emperor *Justinian* did cause *Roman*  
 digest all their Laws into one Body, *Law.*  
 which is now called by most polite Na-  
 tions (for its *Excellency*) the *Civil Law*;  
 and as this Civil Law is much respected  
 generally, so it has great influence in *Scot-*  
*land*, except where Our own express  
 Laws or Customs have receded from  
 \*it. And by the Common Law in our \* *R. J. 6:*  
 Acts of Parliament is meant the † *Ci-* *Par. 8.*  
*vil Law.* *Act 131.*

The *Popes* of Rome, in Imitation of  
 the *Civil Law*, made a Body of Law of  
 their own; which, because it was com-  
 piled by Churchmen, it was called *The*  
*Canon Law* ||: and though it has here  
 no positive Authority, as being compiled  
 by private Persons at the desire of the  
 Popes, especially since the Reformation;  
 yet our *Ecclesiastick Rights*, were settled  
 thereby before the Reformation: And be-  
 cause many things in that *Law*, were  
 founded upon *material Justice*, and ex-  
 actly calculated for all Churchmen;  
 therefore that Law is yet much respected  
 among us, especially in what relates to  
*Conscience, and Ecclesiastick Rights.*

† *K. Ja.*  
*4 Par. 4:*  
*Act 51.*  
*K. Jam.*  
*5. Par. 6:*  
*Act 80.*  
*Q. Mary*  
*Par. 5.*  
*Act 22.*  
*K. Ja. 6:*  
*Par. 1.*  
*Act 31.*  
 || *Canon*  
*Law.*

Book I.

Municipal  
Law of  
Scotland.

\* Acts of  
Parlia-  
ment.  
Acts of Se-  
derunt.  
K. Ja. 5.  
Par. 7.  
Act 93.

Regiam  
Majesta-  
tem.

\* K. Ja.  
1. Par. 3.  
Act 54.  
K. Ja. 3.  
Par. 14.  
Act 115.  
Unwritten  
Law.

Our *Municipal Law* of Scotland, is made up partly of our *written* and partly of our *unwritten Law*: Our *written Law* comprehends, First, our *Statutory Law*, which consists of our *Statutes* or *Acts* of *Parliament*. *Secundo*, The *Acts* of *Sederunt*, which are *Statutes* made by the *Lords of Session*, by *virtue* of a *particular Act* of *Parliament*, \* *impowering* them to make *such Constitutions* as they shall think fit, for ordering the *procedure* and *forms* of *administrating Justice*, and these are called *Acts* of *Sederunt*; because they are made by the *Lords sitting in Judgment*, but are not properly *Laws*, the *Legislative Power* being the *King's Prerogative*. *Tertio*, The *Books* of *Regiam Majestatem*, which are generally looked upon as a part of Our *Law*; which with the *leges Burgorum*, and the other *Tractates* joined by *Skeen* to them, are called the *Old Books* of Our *Law*, by many *express Acts* of *Parliament* \*. Though the *Books* of *Regiam Majestatem*, were originally but the *Works* of one private *Lawyer*, writing by way of *Institution*, and are now very much *abrogated* by *Custom*.

Our *unwritten Law*, comprehends the *constant Tract* of *Decisions*, *past* by the *Lords*

## Of Laws in general.

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Lords of Session, which is considered as Tit. I.  
Law; the Lords respecting very much their own Decisions; and though they may, yet they use not to recede from them, except upon *grave Considerations*. *Secundo*, our *Antient Customs*, make up part of our *Unwritten Law*, which have been universally received among us. The *tacite Consent* of King and People, operating as much in these as *their express concurrence* does in making Laws: And such is the Force of Custom or Consuetude, that if a Statute after long standing has never been in observance, or having been, has run into desuetude, *Consuetude* prevails over the *Statute* till it be renewed either by a *succeeding Parliament*, or by a *Proclamation from the Council*: For though the Council cannot make Laws, yet they may revive them.

Some Laws are called *Declaratory*, because they do not introduce any new Law, but declare what formerly was Law; and these may look backward, (that is to say) *Cases even Prior to the Statute must be Regulated by them*; though generally *Laws look forward*, and regulate only future Cases.

Laws should Command, not Perswade; and though the *Rubrick* (or Title) and

B 3

Narra-

Book I. *Narrative of the Statute*, may direct a doubting Judge, yet if the Statutory words be clear, they should be followed in all Cases.

All Laws should be so interpreted as to evite Absurdities, and as may best agree with the Mind of the *Legislator* and *Analogy*, or general design of the Common Law.

Correctory Laws. *Correctory Laws* (so we call these which *abrogate* or *restrict* former Laws) are to be strictly interpreted, for we should recede as little as can be from received Laws.

Favourable Laws. *Favourable Laws* are to be extended, and the *parity of Reason* often prevails with our Judges to extend Laws to Cases that are founded on the same Reason with what is expressly determined by the Statute.

## T I T. II.

### *Of Jurisdiction and Judges in General.*

Jurisdiction of Judges.

HAVING resolved to follow *Justinian's* Method, (to the end there may be as little difference found betwixt the Civil Law and ours, as is possible ; and that

\*



## Judges in general.

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that the Reader may not be distracted by Tit. II. different Methods) I do resolve, First, to lay down what concerns the Persons of whom the Law treats. *Secundo*, what concerns the things themselves treated of, such as *Rights, Obligations, &c.* *Tertio*, The *Actions* whereby these *Rights* are pursued, which answers to the *Civilians, Objecta juris, viz. Persona, Res, & Actiones.*

The *Persons* treated of in Law, are either *Civil* or *Ecclesiastick*, the Chief of both which in a Legal Sense are *Judges*, with whom we shall begin. And for the better understanding of their Office, it is fit to know, that *Jurisdiction* is a Power granted to a *Magistrate* to cognosce upon, and determine in *Causes*, and to put the *Sentence* or *Decreet* to execution, in such manner as either his *Commission, Law, or Practice* does allow.

All *Jurisdiction* flows originally from the King, so that none have Power to make *Deputes*, except it be contained in their *Commission*; and if a *Depute* appoint any under him, that *Sub-Depute* is called properly a *Substitute*; and every Judge is answerable for the *Malversation* of his *Depute*.

Persons  
Civil and  
Ecclesiastick.

K. C. 2.  
Par. 1.  
Act 2.  
Par. 3.  
Act 10.

## Book I.

Jurisdiction Cumulative and Privative,

\* R. C. 2.  
Par. 3.  
Act. 18.

*Jurisdiction is either Cumulative, or Privative; Cumulative Jurisdiction is when two Judges have Power to judg the same thing: And generally it is to be remembred, that the King is never so denuded, but that he retains an inherent Power to make other Judges with the same Power that he gave in former \* Commissions: And thus he may erect Lands in a Regality, within the Bounds of an Heritable Sheriff-ship, and Burghs Royal, within the Bounds of a Regality; and these Bounds within which a Judg may exerce his Jurisdiction, is called his Territory; so that if any Judg exercise Jurisdiction without his Territory, his Sentence is null; and among those who have a Cumulative Jurisdiction, he who first cites, can only Judg; and this is called Jus Preventionis.*

*Privative Jurisdiction, is when one Judg has the sole Power of Judging, exclusive of all others; such Power have the Lords of Session in judging Declarators of Property, Actions of proving the Tenor, Cessiones Bonorum, &c.*

*Jurisdiction is founded to any Judg, either because the Defender dwells within his Territory, which is called, Sortiri forum ratione domicilii: or, Secundo, because*

## Judges in general.

cause the *Crime was committed within his Territory*, which is called *Ratione delicti*; or, *Tertio*, If the Person pursued, have any immoveable Estate within his *Territory*, though he live not within the same, he may be pursued by any *Action to affect that Estate*, which is called *sortiri forum ratione rei sitæ*.

*A Jurisdiction is said to be Prorogate, when a Person not otherways subject, submits himself to it, as when he compares before an incompetent Judge, and propones Defences.*

All Judges with us must take the *Oath of Allegiance*, \* and the *Test*, † whereby \* K. C. 2. Par. 1. Sess. 1. A& 11. † Par. 3. A& 18. they Swear to maintain the Government of Church and State, as it is now established; and an *Oath de fidelis administratione*, before they exerce their Office: and no excommunicate Person, nor Rebel against the Government, can Judg by our Law.

If a Person be pursued before a Judge who is not competent, he may complain to the *Lords of Session*, and they will grant *Letters of Advocation*, whereby they *Advocate*; that is to say, call that Cause from the incompetent Judge to themselves: And if after the *Letters of Advocation* are intimated to that Judge, he yet

Tit. II.

Prorogate  
Jurisdiction.

\* K. C. 2.  
Par. 1.  
Sess. 1.  
A& 11.  
† Par. 3.  
A& 18.

Advoca-  
tion of  
Causes.

Book I. yet proceed, his Decreet will be null, as  
 given *Spreto mandato*.

Division of Jurisdic-  
 tions. *Jurisdiction* is either *Supream*, *Infe-*  
*rrior*, or *Mixt*: These Courts are proper-

Supream  
 Courts.

Inferior  
 Courts.

ly called *Supream*, from whom *there is*  
*no Appeal to any Higher Judicatory*, such  
 as the *Parliament*, *Privy Council*, *Lords*  
*of Session*, the *Criminal Court*, and *Ex-*  
*chequer*. *Inferior Judges* are such, whose  
*Decrees and Sentences* are liable to the  
*Reviews of the Supream Courts*, as *Sher-*  
*riffs*, *Stewards*, *Lords of Regality*, *Infe-*  
*rior Admirals*, and *Commissars*, *Magi-*  
*strates of Burghs Royal*, *Barons*, and *Ju-*  
*stices of Peace*. *Mixt Jurisdiction* par-  
*ticipates of the Nature* both of the *Sup-*  
*reams* and *Inferior Courts*; such a *Jurif-*  
*diction* have the *High Admiral*, and  
*Commissars of Edinburgh*. Both which  
 are in so far *Supream*, that *Maritim Af-*  
*fairs*, and *Confirmations of Testaments*,  
 must come in and be tabled before the  
*High Admiral*, and *Commissars of Edin-*  
*burgh*, in the *first instance*. As also, they  
 both can reduce the *Decrees of Inferior*  
*Admirals* and *Commissars*: But seeing  
 their *Decrees* are subject to the review of  
 the *Lords of Session*, they are in so far *In-*  
*ferior Courts*.

No

## Judges in general.

II.

No inferior Judge can judge in the Causes of such as are *Cousin-germans* to him, or of a nearer degree, either of *Affinity* or *Consanguinity*: But there is so much trust reposed in the *Lords of Session*, that by a special \* Statute, they can only be declined in Cases relating to their *Fathers*, *Brothers*, *Sons*, *Nephews*, or *Uncles*; which by a late Statute \*, is likewise extended to the degrees of *Affinity*, and to the *Lords of Privy Council* and *Exchequer*, and the *Commissioners of Justiciary*, and to all other Judges within the Kingdom.

Tit. III.

\* K. J. 6.

Par. 14.

Act 212.

\* K. C. 2.

Par. 3.

Act 13.

The Members of the College of Justice have this Privilege, that they cannot be pursued before any Inferior Judge; and if they be, the Lords will Advocate the Cause to themselves.

Privilege of the College of Justice.

## T I T. III.

Of the Supreme Judges and Courts of SCOTLAND.

THE King is the Author and Fountain of all Power, and is an absolute Prince, having as much Power as any King or Potentate whatsoever, \* deriving his

\* K. J. 6.

Par. 15.

Act. 251.

Book I. *his Power from GOD Almighty alone \*, and so not from the People.* The special

\* K. C. 2. Privileges that he has, are called, *His Prerogative Royal*; such as that he only can make *Peace* or *War*, call *Parliaments*, *Conventions*, *Convocations* of the *Clergy*, make *Laws* †: And generally all Meetings called without his special Command † are punishable ||: he only can remit Crimes, legitimate Bastards, name Judges and Counsellors, give Tutors Dative, and naturalize Strangers, and is *Supream over all Persons, and in all Causes, as well Ecclesiastick as Civil* \*.

\* K. J. 6. The Parliament of old was only the King's *Baron Court*, in which all Freeholders were obliged to give sute and presence in the same manner that Men appear yet at other Head Courts. And therefore, since we had Kings before we had Parliaments, it is evident that the King's Power flowed not from them.

The Parliament is called by Proclamation now on Forty days, though it may be adjourned by Proclamation on Twenty days preceding the prefixt day, at which it should have met; but of old it was called by *Brieves* out of the *Chancellery*. It consists of *three Estates*, viz. the *Arch-Bishops* and *Bishops*; and before

## and Courts of Scotland.

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fore the Reformation, all *Abbots* and *Mitred Priors* sat as *Church-men*. *Secundo*, The *Barons*, in which Estate are comprehended all *Dukes*, *Marquesses*, *Earls*, *Viscounts*, *Lords*, and the *Commissioners* for the *Shires*; for of old all *Barons* who held of the *King* did come; but the *Estates* of lesser *Barons* not being able to defray this Charge, they were allowed to send *Commissioners* for every *Shire*: \* And generally every *Shire* sends two, who have their Charges born by the *Shire*. *Tertio*, The *Commissioners* for *Burghs Royal*, each whereof is allowed one, and the *Town of Edinburgh* two; though all the three *Estates* must be cited, yet the *Parliament* may proceed, albeit any one *Estate* were absent, or being present would disassent. The *Legislative Power is only in the King*, and the *Estates of Parliament* only consent; and in *Parliament* the *King* has a *Negative Voice*, whereby he may not only hinder any *Act* to pass, but even any *Overtures* to be first *Debated* there. The *Acts* of *Parliament* must be proclaimed upon *Forty* days, that the *Lieges* may know them; and till these *Forty* days elapse, they are not binding \*.

Tit. III.

\* K. J. 1.

Par. 7.

Act 101.

K. J. 6.

Par. 11.

Act 311.

\* K. J. 6.

Par. 7.

Act 128.

\*

To

## Book I.

Lords of  
the Arti-  
cles.

To secure the Crown against Factions, and impertinent Overtures in open Parliament, our Parliaments choose before they proceed to any business, *eight* out of each *State*, who with the *Officers of State*, determine what Laws or *Overtures* are to be brought in to the Parliament; and they are therefore called *The Lords of Articles*: And are chosen in manner following, First, the whole Bishops go by themselves, and the Nobility by themselves; and the Clergy make choice of eight Noblemen, and the Noblemen make choice of eight Bishops; and then both Clergy and Nobility meet together, and make choice of eight Barons, and eight Burgesses; which Election being reported to the Parliament, it is by them approved: And then the Commissioner adds to them *the whole Officers of State*\*.

\* R. C. 2.  
Par. 1.  
Self. 3.  
Act 1.


Conven-  
tion of  
Estates.

We have another meeting of the *three Estates*, called, *The Convention of Estates*; which is now called upon Twenty days, and proceeds in the same way that the Parliament does, differing only from it in that the Parliament can both impose Taxations, and make Laws; whereas the *Convention of Estates* can only impose, or rather offer Taxations, and make Statutes for



## and Courts of Scotland.

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for uplifting those particular Taxations, Tit. III.  
but can make no Laws. And of old,   
I find by the Registers of the Conventions,  
(the eldest whereof now extant, is in Anno  
1583.) that the Convention of Estates  
consisted of any number of the three E-  
states, called off the Streets summarly by  
the King; and yet they cried down or  
up Money, and judged Proceffes, which  
now they do not.

The Privy Council is constituted by a Privy  
special Commission from the King, and Council.  
regularly their Power extends to Matters  
of Publick Government; in order to which  
they punish all Riots, for so we call Breach  
of Peace. They sequestrate Pupils, give  
Aliments to them, and to Wives who are se-  
verely used by their Husbands, and many  
such things which require so summar pro-  
cedour, as cannot admit of the delays neces-  
sary before other Courts: And yet if any  
of these dip upon Matter of Law, (for they  
are only Judges in *facto*) they remit the  
Cognition of it to the Session, and stop  
till they hear their Report. The Council  
also may delay Criminal Executions, and  
sometimes change one Punishment into ano-  
ther, but they cannot remit Capital Pu-  
nishments: They may also Adjourn the  
Session, or any other Court: It has its  
OWN

Book I. *own President*, who presides in the Chancellor's absence, and its own Signet and Seal: All who are cited to compare there, must be *personally present*, because ordinarily the Pursuer concludes, that they ought to be *personally punished*. All *Dyets are peremptor*, all Debate is in Write, no Advocate being ordinarily allowed to Plead before them, because the Council only judges in Matters of Fact.

The Lords of Council and Session are Judges in all Matters of *Civil Rights*; of old they were chosen by the Parliament, and were a Committee of Parliament\*.

\* K. J. 2. But the present *Model* was fixt and established by *King James the Fifth*, after the Par. 14. Act 61, Model of the Parliament of *Paris*\*.

\* K. J. 5. Of old it consisted of seven *Ecclesiasticks*, and seven *Laicks*, and the *President* was a *Churchman*; but now all the fifteen are *Laicks*. And there sits with them four

Noblemen, who are called *Extraordinary Lords*, and were allowed to sit to learn rather than decide; but now they Vote as well as the *Ordinary Lords*. All the Lords are admitted by the King, and by Statute cannot be admitted till they be Twenty

\* K. Ja. 6. five Years of \* Age, and except they have Par. 12. a 2000 *lib.* or 20 *Chalders* of *Virtual* in Act 132. yearly Rent. Nine are a *Quorum*.

Crimes

## Courts of Scotland.

17

Crimes of old, were judged by the Tit. III.  
*Justice General, Justice Clerk, and two*  
*Justice Deputes*; but now *five Lords of Criminal*  
*Session* are joined to the Justice General, Judges.  
 and Justice Clerk, and they are called the  
*Commissioners of Justiciary*, because they  
 sit by a special Commission: Four of \* K. C. 2.  
 which number make a Quorum in time Par. 2.  
 of Session, three in time of Vacance, and Sess. 3.  
 two at Circuit Courts \*. Act 18.

The *Exchequer*, is the King's Cham- Exche-  
 berlain-Court †, wherein he judges quer.  
 what concerns his own Revenues; it † K. C. 1.  
 consists of the *Treasurer*, (in whole Par. 1.  
 Place are sometimes named *Commissioners*  
*of the Treasurary*) the *Treasurer De-*  
*pute*, and as many of the Lords of Ex-  
 chequer as His Majesty pleases. Act 18.

The *High Admiral* has a Commission High Ad-  
 from the King to judge in all Maritime miral.  
 Affairs, not only in Civil but also in Cri-  
 minal Cases, where the Crime is com-  
 mitted at Sea, or within Flood-mark;  
 nor can the Lords of Session advocate  
 Causes from him ||, though they can re- || K. C. 2.  
 duce his Decrets, as he does the De- Par. 3.  
 creets of all inferior Admirals, or Admi- Ads 16.  
 ral Deputes.

G

Tit.

## TIT. IV.

*Of Inferior Jurisdictions and Courts.*

**N**O Judicature whatsoever can sit in time of Parliament, without a Dispensation from the Parliament; and no Inferior Court can sit in time of Vacance without a Dispensation from the Lords of Session: But after *Michaelmas* Head Court the Restriction ends, and they may at any time proceed to *cognosce Crimes*, without Dispensation for *Interest Reipublicæ*, that *Crimes be punished without delay*.

Sheriff.

|| K. J. 6.  
Par. 12.  
Act 24.

The *Sheriff* is the *King's Chief* and *Ancient Officer*, for preserving the *Peace*, and putting the *Laws* in execution ||; he has both a *Civil* and *Criminal Jurisdiction*, and his Commission is under the *Great Seal*; he is obliged to raise the *Hue and Cry* after all *Rebels*, and to apprehend them when required; to assist such as are *violently dispossessed*; to apprehend such as *say Mass*, or trouble the *Peace*, and take Caution for their appearance\*: He is *Judge* in all Crimes, except *Treason*, and the *four Pleas* of the *Crown*,

\* K. C. 2.  
Par. 1.  
Sess. 3.  
Act 15.

*Crown, to wit, Murder, Fire-raising, Rob- Tit. IV.  
bery, and ravishing of Women \**; but Murder he can only judg, if the Murde- \* Leg.  
rer was taken with *red Hand*, that is to Mak. 2:  
say, *immediately committing the Murder*; Act II:  
in which Case, he must proceed against Quoniam  
him *within three Suns*; and in *Theft* he Attach.  
may judg, if the *Thief* was taken with cap. 79:  
the *Fang*.

The *Sheriff* is also *Judg* competent, to punish *Bloodwits*, for which he may fine in 50 *Pounds Scots*, but no higher *Regularly*; except the *Riot* be *atrocious*, or *aggravated* by the *Circumstances of the Time and Place*, when and where it was committed, or of the *Persons* upon whom it was committed. He may likewise for *Contumacy* fine in 50 *Pound Scots*.

*Royal Burghs* are not *Sheriffs* within themselves, except the *King* grant them the *Privilege* by a *special Concession*; and even when they are erected *Sheriffs* within themselves, they are not exem'd from the *Sheriffs Jurisdiction*, within whose *Bounds* the *Burgh* doth lye, but they have only a *Cumulative Power* with them; so that there is *locus Preventionis*, and the first *Atacher* will be preferred: But if their *Erection* contain a *Power of Repledging* from the *Sheriff*, then they have

Book I. the same Power that is competent to a  
 Lord of Regality.

Lords of Regality. A Lord of Regality is he who has the Land whereof he is Proprietor or Superior, erected with a Jurisdiction equal to the Justices in Criminal Cases, and to the Sheriff in Civil Causes; he has also right to all the Moveables of Delinquents and Rebels, who dwell within his own Jurisdiction, whether these Moveables be within the Regality or without the same: And because he has so great Power, therefore no Regality can legally be granted except in Parliament \*.

\* K. J. 2.  
 Par. 11.  
 Act 43.

Repledgi-  
 ation.

† K. J. 6.  
 Par. 11.  
 Act 29.

\* Quoni-  
 am At-  
 tach. c. 89.

Stewart.

The Lord of Regality, has also by his Erection Power to repledge from the Sheriff, and even from the Justices in † all Cases except Treason, and the Pleas of the Crown, that is to say, to appear, and crave that any dwelling within his Jurisdiction, may be sent back to be judged by him; and he is obliged to find caution that he shall do Justice upon the Malefactor whom he repledges within Year and Day, and the caution is called Culreach \*.

The Stewart is the King's Sheriff within the King's own proper Lands, having as much Power and Privilege as a Regality; and these were erected where the  
 Lands

Lands having been erected before in Tit. IV. *Earldoms* or *Lordships*, fell in the King's Hand by forefaulture or otherwise. For else the King appointed only a *Baillie* *Baillie*. in them, and these *Jurisdictions* are called *Baillivaries*, the *Baillies* of the King's proper Lands having the same Power with the *Sheriff*. And all these, viz. the *Sheriff*, the *Stewart*, and the *Lord of Regality*, proceed in their *Courts* after the same way, and each of them has a *Head Burgh* where they hold their *Courts*, and where all Letters must be executed and registrated.

The *Prince of Scotland* has also an *Appanage* or *Patrimony*, which is erected in a *Jurisdiction* called the *Principality*. The Revenues come into the *Exchequer* when there is no *Prince*; but when there is one, he has his own *Chamberlain*. *Prince of Scotland.*

*Justices of Peace*, are these who are *Justices of* appointed by the King, or *Privy Council*, *Peace*. to advert to the keeping of the *Peace*; and they are Judges to *petty Riots*, *Servants Fees*, and many such like, relating to good Neighbour-hood, exprest in the Instructions given them by the *Parliament* \*, and \* K. C. 2, are named by the *Council*; albeit, by Par. 1. the foresaid *Statute*, the *Nomination* is to Act 38.

Book I. be by His Majesty and his Royal Successors, which the King has now remitted to the Privy Council.

Constables.

The Justices of Peace do name Constables, within their own Bounds, from Six Months to Six Months; Their Office is, to wait upon the Justices, and receive Injunctions from them, delate such Riots and Crimes to the Justices, as fall under their Cognisance; apprehend all Suspect Persons, Vagabonds and Night-walkers, as is at length contained in their Injunctions, given them by the foresaid Act.

Baron Courts.

Every Heritor may hold Courts for causing his Tennants pay his Rent: And if he be Infeft *cum curia*, he may decide betwixt Tennant and Tennant in small Debts, and may judg such as commit Blood on his own Ground, though his Land be not erected in a Barrony; but if his Land be erected in a Barrony, (which the King can only do) he may (like the Sheriff) unlaw for blood-wits, in 50 lib. and for absence in 10. And if he have power of Pit and Gallows, he has as ample a Criminal Jurisdiction as the Sheriff, though with this difference, that the Sheriff can judg a Thief upon Citation, whereas the Baron can only judg him if he apprehend him within the Barrony:  
And



And if the *Sheriff* have first *cited* or *attached* the *Malefactor*, he excludes the *Barons Jurisdiction* by that prevention.

Tit. V.

## T I T. V.

## Of Ecclesiastick Persons.

Since the *Reformation*, the *King* is come by Our Law in Place of the *Pope* \*, and all Rights to *Kirk-lands*, must be confirmed by him, else they are null †. His *Majesty* only can call *Convocations* of the *Clergy*, (for so we call our *National Assemblies* ||) and his *Commissioner* sits in them, and has a *Negative*.

\* K. J. 6.

Par. 1.

Act 2.

† K. J. 6.

Par. 9.

Act 7.

Convocation of the Clergy.

We have two *Archbishops*, and twelve *Bishops*, and they are thus *elected*; the *King* sends to the *Chapter* a *Conge de Eslire*, (which is a *French* word, signifying a *Power to Elect*) and with it a Letter recommending a Person therein named, and the *Chapter* returns their *Election*: whereupon the *King* grants a *Patent* to the *Elected*, giving a *Right* to the *Revenue* during life, and a *Mandate* to the *Archbishop* or *Bishops* to *Consecrate* him: Both which pass the *Great Seal* \*.

|| K. J. 6.

Par. 8.

Act 131.

K. C. 2.

Par. 1.

Sess. 1.

Act 4.

Sess. 3.

Act 5.

Archbishop and

Bishops.

\* K. J. 6.

Par. 22.

The Act 1.

Book I.

Synods.

\* K. J. 6.

Par. 21.

Act 1.

The *Archbishops* and *Bishops* have the sole Power of calling *Synods*, which is a *Provincial Assembly* of all the *Clergy* within one *Diocesis* \*; and in these they name the *Brethren* of the Conference: who are like the *Lords of Articles* in the *Parliament*; and by their Advice the *Bishops* depose, suspend, and manage.

Chapter.

\* K. Ja. 6.

Par. 18.

Act 3.

*Bishops* have their *Chapters*, without whose Consent, or the *major Part*, the *Bishop* cannot alienate nor dilapidate any part of their *Patrimony* \*, which *major Part* must sign the *Deeds* done by the *Bishops*: And it is sufficient if those of the *Chapter* sign at any time even after the *Bishop*; but it must be in his lifetime: Nor are *Minors*, or *Absents* counted; and one having two *Benefices*, has two *Votes*: but the *Appending* of the *Seal* is by special *Statute* declared to be sufficient in *Deeds* done by the *Archbishop* of *St. Andrews*, without the *Subscriptions* of the *Chapter* †.

† K. Ja. 6.

Par. 15.

Act 8.

A *Parson* or *Rector Ecclesie*, is he who is presented to the *Tithes*, *jure proprio*; but because of old *Parsonages* were bestowed on *Monasteries*, therefore they sent *Vicars*, so called, because they served the *Cure* for them; and who got a share of the *Stipend* for their pains, either *ad placitum*:

Vicars.

*placitum*; and they were called *simple* Tit. V. *Vicars*, or for *Life*, and they were called *perpetual Vicars*: and after the Reformation, the Churches which so belonged to them continued *Vicarages* still; The *Ti-tular*, who came in the place of the *Con-vent*, retaining the right to the *Parsonage-Duties*.

There were in the time of *Popery*, Collegiat *Collegiat Kirks* built, and doted by *Kings* Kirks, and great Men, for singing of *Mass*, which were governed by a *Provost*, and some for singing, who were called *Prebends*: And because some *Parishes* were wide, some were allowed to build a *Chapla-Chapel* for their *private Devotion*: And *naries*. since the *Reformation*, these *Chaplanaries* and *Prebendaries* are allowed to be bestowed by the *Patrons*, upon *Bursers* in \* K. Ja. 6. *Colleges*, notwithstanding of the *Founda-tions* \*. Par. 1. Act 12.

For understanding all these, it is fit to know, that the *Primitive Church*, either to invite Men to *build* or *dote*, or to reward such as had, did allow such as either had built, or had bestowed the Ground whereon to build, or had doted a *Church* already built, to *present* alone, if they were the only *Benefactors*, or by turns if they were more; and they were called

\*

Book I. called *Patrons*, or *Advocati Ecclesiarum*,  
 according to that,

*Patronum faciunt, dos, edificatio, fundus.*

Patron.

When a *Church* vaiks, the *Patron* must present within six Months a fit *Person* to the *Bishop*; else the right of *Presentation* falls to the *Bishop*, *jure devoluto* \*: but if the *Bishop* refuse to admit and collate the *Person* presented, the *Patron* must complain to the *Archbishop*; and if he also refuse, or delay, the *Privy Council* will grant Letters of *Horning* against the *Bishop*, to receive the *Person* presented †; and during the *vacaney* upon that refusal, the *Patron* may retain the *vacant stipends*.

\* K. Ja. 6.  
 Par. 2.  
 Act. 1.

† Act fore-  
 said.

Collation  
 and Insti-  
 tution.

Upon this *Presentation* the *Bishop* causes serve an *Edit* on nine Days, wherein all *Persons* are after *Divine Service* advertised to object why such a *Man* should not be admitted to the *Benefice*: And if none object, the *Bishop* confers the *Church* and *Benefice* upon the *Person* presented; and this is called a *Collation*: after which, the *Bishop* causes enter him, who is so *collated*, by causing give him the *Bible* and the *Keys* of the *Church*; and this is called *Institution*: *Presentation* gives only

\*

jus

*jus ad rem*, and Institution *jus in re*, and Tit. V. is as a *Seasin*.

If the Bishop be Patron himself, he confers *pleno jure*; and the Presentation and Collation are the same: Bishops also have *Mensal Churches*, so called, Mensal Churches. because they are *de mensa Episcopi*, being a part of his *Patrimony*, in which he serves by his *Vicars*, and plants as *Diocessian Bishop*; and if a *Town* or *Paroch* resolve to make a *second Minister* when they are not *Patrons*, he is called a *Stipendiary Minister*; (as are all Ministers who are presented to *modified Stipends*) and he is *collated* and *instituted* also, but the *Patron's* Presentation is sufficient in *Prebendaries* and other *Benefices*, which has not *curam Animarum*; and that without the necessity of *Collation*, or *Institution*; the *Bishop* having no other Interest in the *Benefices*, but in so far as they concern the *cure of Souls*.

By Act of Parliament, all *Ministers* Ministers must have a competent Stipend, not below *eight Chalder of Victual*, or 800 *Merks*, or above a 1000 *Merks* or 10 *Chalder of Victual*, (except there be just reason to give less) \* together with a \* K. Ja. 6. Par. 22. Act 3. *Manse* and *Gleib*. But the *Commissioners* for plantation of Kirks, are not now precisely


Book I. precisely tied to these Proportions, but  
 ~~~~~ may modify either more or less, according  
 as they see cause.

Manse. The *Manse*, à *manendo*, is the place  
 where the *Minister* is to dwell; the *Gleib*,  
 from *Gleba terra*, is a piece of Land for  
 Corn and Fether to his Beasts: If there  
 was a *Manse* of old belonging to the *Par-*  
*son* or *Vicar*, the *Minister* has right to it;  
 if there was none, the *Parochiners* must  
 build one, not exceeding a 1000 lib. and  
 not beneath 500 Merks\*, at the sight of  
 the *Bishop* of the *Diocie*, or such *Mini-*  
 \* K. Ja. 6. *sters* as he shall appoint, with two or three  
 Par. 13. of the most discreet Men in the *Paroch*;  
 Act 161. as also the *Heritors* are liable to repair  
 the *Manse*: But the present *Incumbent* is  
 obliged to leave it in as good condition as  
 they gave it to him †.

† K. Ja. 6. The *Ministers Gleib*, is to comprehend  
 Par. 21. four Acres of *Arrable Land*, or sixteen  
 Act 8. sown-grass where there is no *Arrable*  
*Land*, which is to be designed out of the  
 Lands which belonged of old to *Abbots*,  
*Priors*, *Bishops*, *Friers*, or any other  
 Kirk-lands within the *Parish* ||; with  
 || K. Ja. 6. freedom of *Foggage*, *Pasturage* for a  
 Par. 3. *Horse* and two *Cows*, *Fewel*, *Feal* and *Di-*  
 Act 48. *vot*; which *Gleibs* are to be deligned by  
*Ministers* named by the *Bishop*, with the  
 advice

## Of Ecclesiastick Persons:

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vice of two of the most honest and godly of *Tit. V.*  
the Parishoners, and the designation is to   
be signed by the designers \*. *\* K. Ja. 6.*

If a *Bishop* or *Minister* be consecrated, *Par. II.*  
translated, or entered to his Benefice before *Act 116.*  
*Whitsunday*, he has right to the  
whole Years Fruits, because they are then  
presumed to be fully sown; and if he be  
deposed or transported before *Whitsunday*,  
for that same reason he hath no part of  
that Year: But if he serve the Cure after  
*Whitsunday*, and be transported or depo-  
sed before *Michaelmas*, he hath the half  
of that Year's Stipend; and if he serve till  
after *Michaelmas*, he hath the whole. So  
that the legal terms of Benefices are *Whit-*  
*sunday*, at which time the Sowing is ended;  
and *Michaelmas*, at which time the Fruits  
are reaped.

The Relicks, Bairns, or nearest of Kin,  
have likewise right to the *Annat* after  
their Death, which was introduced by  
the Canon Law, and by a special Statute  
with us, is declared to be half a Year's  
Rent of the Benefice or Stipend, over and  
above what is due to the Defunct, for his  
Incumbancy \*: So that if he survive *Whit-*  
*sunday*, they have the half of that Year  
for his Incumbancy, and the other half  
as *Annat*, and if he survive *Michael-*

*\* K. C. 2.*  
*Par. 2.*  
*Seff. 3.*  
*Act 13.*

*mas,*

Book I. *mas*, they have the half of the next Year for his *Annat*.

The *Annat* is equally divided betwixt the *Relict* and the Children; and if the *Defunct* have neither, it belongs to the nearest of *Kin*; it needs no Confirmation, for it never belonged to the *Defunct*, being a meer Gratuity bestowed by the *Law* for entertaining these, because it is presumed *Ministers* have not much to leave them: And for the same reason it is not affectable by the *Defuncts Creditors*, nor can it be disposed upon by himself to Strangers, either in his Testament or by Assignment.

High Com-  
mission.

Commit-  
tee of Par-  
liament.

There is a *Committee of Parliament* always sitting, called the *Commission for Plantation of Kirks, or Valuation of Teinds* (consisting of a *Select* number of so many of every *Estate of Parliament*;) who have Power to *modify* and *augment Ministers Stipends*, and to *unite* and *disjoin Churches*, &c. whose Decrees, because they are a *Committee of Parliament*, cannot be reduced by the *Session*, or any other *inferior Judicature*.

The *Primitive Christians* remitted the Cognition of all Cases that related to Religion, as the Matters of *Divorce*, *Bastardy*, the *Protection of Dying Mens Estates*,



## Of Ecclesiastick Persons.

31

*Estates*, to their *Bishops*, or such as they Tit. V.  
 imployed under them, who were called *Officials*, and with us are called *Commis-*  
*sars*; and are called therefore *Judices* *Commis-*  
*Christianitatis*: And they are therefore *fars*.  
 the only Judges in *Divorce*, because it is  
 the breach of a *Vow*: And to *Scandal*,  
 because it is an offence against *Christia-*  
*nity*: And of all Matters referred to *Oath*,  
 (if the same exceed not 40 *lib. Scots*)  
 because that Power is contained in their  
 Instructions, and that an *Oath* is a *Reli-*  
*gious Tie*.

Every *Bishop* has his *Commissar*, who  
 has his Commission from the *Bishop* on-  
 ly; and this extends no further than  
 the *Constituent's Diocie*. But the *Arch-*  
*bishop* of *St. Andrews* has Power to name  
 four *Commissars*, who are called the *Com-*  
*missars of Edinburgh*, because they sit *Commis-*  
 there, and they only are *Judges to divorce* *fars of E-*  
 upon *Adultery*, and can only declare *dinburgh*.  
*Marriages null for Impotency*, and to  
*Bastardy*, when it has any *Connexion*  
 with *Adultery* or *Marriage*: And they  
 only may reduce the *Sentences* of all  
*Inferior Commissars* \*, though the *Lords* \* K. Ja. 6.  
 of *Session* may reduce even their *De-* Par. 26.  
*creets and Sentences*. They have *In-* Act 6.  
 structions from the *King*, which are  
 their

Book I. their *Rule*. And these are likewise recorded in the Books of *Sederunt of Session*.

## T I T. VI.

## Of MARRIAGE.

*Having spoken fully of Persons, as they are considered in a Legal sense; we shall now treat of Marriage, which is the chief thing that concerns Persons, and their State in Law.*

Marriage. **M**Arriage is defined to be the *Conjunction of Man and Wife, vowing to live inseparably together till death.*

By *Conjunction*, here, *Consent* is understood; *nam consensus, non coitus, facit Matrimonium.*

*Consent*, is either *de futuro* or *de presenti*. *Consent de futuro*, is a Promise to solemnize the Marriage, which in Law is called *Sponsalia*; and this is not Marriage; for either Party may refile, *rebus integris*, notwithstanding of the intervening Promise, or *Esponsals*. *Consent de presenti*, is that in which Marriage does consist; and therefore it necessarily follows,

follows, that none can *Marry* except these Tit. VI:  
 who are *capable* to consent, and so *Idiots* ~  
*and furious Persons, durante furore*, can-  
 not *Marry*; nor *Infants*, who have not  
 attain'd the use of *reason*: that is, when  
 they are within the *Tears of Puberity*,  
 which is defined in *Law* to be 14 Years  
 in *Males* and 12 in *Females*, *Nisi malitia*  
*suppleat aetatem*.

The *Law* in *decency* requires the con-  
 sent of *Parents*, though a *Marriage* with-  
 out it is valid, if the Persons *Married* be  
*capable* of consenting.

By our *Law*, none can *marry* who are  
 nearer related than *Cousin-germans*, which  
 is suitable to the *Judicial Law* of *Moses* \*, \* Levit.  
 and the same degrees prohibited in *Con-* chap. 18:  
*sanguinity* are also forbidden in *Affinity*. K. Ja. 6.  
Par. 1.

*Marriage*, is either *Regular* and So- Act 1.  
*lemn*, or *Clandestine*; the *Regular* way Division  
 of *Marrying* is; by having their Names of Mar-  
 proclaim'd in the *Church*, three several riage.  
 times, which we call *Proclamation* of

*Banns*, without which; or a *Dispensation*  
 from the *Bishop*, the *Marriage* is called † K. C. 2.  
 a *Clandestine Marriage*; and the Parties Par. 2.  
 are *fineable* for it; and both lose their Seff. 3.  
 † *Jus Mariti*, and *Jus Relicti*, but the Act. 9.  
*Marriage* is still valid ||; *Cohabitation* || K. C. 2.  
 also, or dwelling together, is presum'd Par. 1.  
Seff. 1.  
Act 34.

Book I. to be *Marriage* \*, if the Parties were  
 ~~~~~ repute, *Man and Wife during their life-*  
 \* K. Ja. 4. *time*, and so the *Children* are not *Bastards* ;  
 Par. 6. though they cannot prove that their *Pa-*  
 Act 77. *rents* were *Married* unless it be clearly  
 K. C. 2. prov'd that they *were not Married*.

Par. 2. From the *conjugal Society*, arises the  
 Act 9. communion of *moveable Goods* betwixt  
 Sess. 3. *Man and Wife*, but the *Administration*  
 Commu- thereof during the *Marriage* is solely in  
 nion of the *Husband* ; which reaches even to  
 Goods, Alienation, and disposing upon the  
 Moveables at his pleasure, though they be  
 not dispon'd to him by her, (*Marriage*  
 being a *Legal Assignment* as to this ef-  
 fect) but he has no further *right* to her  
*Heritage*, save that he has *right* to the  
*Rents* of it, and to *administrate* and *ma-*  
*nage* it, during the *Marriage*, and this  
 Jus Mariti. is called *Jus Mariti*, and is so inseparable  
 from the quality of a *Husband*, that he  
 cannot by *Our Law* renounce his *Power*  
*of Administration*, so that they are both  
*Domini* by this *Communion* ; but the *Huf-*  
*band* has during the *Marriage* the *Admi-*  
*nistration* and *Disposal* of the *Goods* in  
 the *Communion* : But a *Stranger* may  
 effectually convoy an *Estate* to a *Wife*,  
 so as that it will never be subject to the  
*Husband's Administration*.

\*

The

The *Husband* is liable during the Marriage to pay her moveable *Debts*; but how soon the Marriage is dissolv'd, he is no further liable to pay her *Debts*, than in as far as he was a *Gainer* by her *Estate*, or that there was such diligences done against him during the Marriage that affects his *Estate*, either heritable or moveable.

If the *Wife* contract any *Debt*, or do any other Deed after the Proclamation of *Banns*, the *Husband* will not be thereby *Prejudg'd*.

The *Husband* is also oblig'd to *Aliment* his *Wife*, and if he refuse, the *Privy Council*, or *Lords of Session*, will modify an *Aliment* to her out of her *Husband's* means, suitable to his *Quality*, which they will also grant, *ob sevitiam*, if he treat her *Inhumanely*.

The *Husband* is *Tutor* and *Curator* to his *Wife*, and therefore if she had *Tutors* or *Curators* formerly, their Power is devolved over by the *Law* upon the *Husband*; and whatever deeds she does without his consent are *null*, whether she be *major* or *minor*, and when she is *cited*, he must be *cited* for his Interest; and if she Marry during the Dependence of a *Process*: The *Husband* must be called by *Letters of Supplement*. D 2 Be-

Book I.



Because the *sole Administration*, during the Marriage belongs to the *Husband*; *Law* hath secured the *Wife*, that she cannot oblige her self when she is cloathed with a *Husband*, albeit with his consent; and therefore all Bands and Obligations granted by a *Wife*, *stante Matrimonio*, are *ipso jure*, null; but if she oblige her self, *ad factum prestandum*, she will be liable, as if she should oblige her self to *Insest* any Man in Lands properly belonging to her self.

Donatio  
inter vi-  
rum &  
uxorem.

During the *Marriage*, all *Donations* made betwixt *Husband* and *Wife* are *Revokable* at any time in their *life*, (except in so far as they are *suteable Provisions*) lest otherways they might *ruine themselves*, thorow *Love*, *Fear* or *Importunity*; and that either expressly, by *revoking* what is done (though they obliged themselves not to *revoke*) or *tacitly*, by *disponing* to others, what was so *gifted*.

All *Rights* made by a *Wife* to her *Husband*, or any third Party with his consent and to his behoof, are valid *Rights*; if they be *Ratified* by her before a *Judg*, before whom she is to declare *without the presence of her Husband*, that she was not compelled to do that deed, and  
Swear

Swear that she shall never quarrel the same : whereas, if they be not Ratified, they may be quarrelled, as extorted *vi & metu*, or may be Revoked as *donatio inter Virum & Uxorem*, which the Ratification before any Judg does absolutely exclude, *propter Religionem Sacramenti*, the Ratification being *extra presentiam mariti*, though she was forc'd.

Tit. VI.

Marriage is dissolved either by Death or Divorce, and if the Dissolution of the Marriage be by Death, there is a difference if the samen be within Year and Day of the Marriage, or thereafter ; for if either the Husband or the Wife die within the Year, all things done in *tuin Matrimonii*, become void, and return to the same Condition they were in before the Marriage ; except there be a living Child, procreate of the Marriage, who was heard cry.

Dissolu-  
tion of  
Marriage.

If the Marriage be dissolved by Death after the Year expires, then the Wife surviving has right to a third of the moveable Estate if there be Children, and to the half if there be none, and this is called *jus Relictæ* ; and though this right does not hinder the Husband, to give or dispose upon his Moveables in his life, yet he cannot do any Deed to defraud his Wife

Jus Reli-  
ctæ.

Book I. *Wife of this Right*, the *Fraud* being palpable; she has also a right to a *life-rent* of the third of the *Lands*, wherein he died *infeft*; and this is called a *Widows*

*Terce*. *Terce*; and to any other *Provisions* contained in her *Contract of Marriage*: And if she be provided to any particular *Pro-*

\* K. C. 2. *vision*, she is excluded from a *Terce* \*;

Par. 3. *Nam in hoc casu provisio hominis tollit*

A<sup>c</sup>t. 10. *provisionem Legis*, unless her *Terce* be expressly reserved. A *Wife* has right to

Paraphernalia. her *Paraphernalia*, exclusive both of the

*Husband's Dominium* and *Administration*, by which is meant her wearing *Cloaths* and *Jewels*; and the *Husband* surviving has right to the *Tocher*: And if he marry an *Heretrix*, he has right to all her *Lands* after her *Death*, during his own *Life*, if there be a *Child* of the *Marriage* who was heard *cry*, and this is called, *the Courtessie of Scotland* \*.

Courtesie of Scotland.

\* Reg.Ma.

lib. 2. c. 3.

Leg. 8.

Burg.

cap. 44.

*Marriage* may be either declared to have been null *ab initio*, for *Impotency*, *Contingency of Blood*, or that either *Party* stands *Married*; or else it may be dissolved for *Adultery*. The *Cognition* of all which belongs to the *Commissars* of *Edinburgh* privitively: or for wilful *De-*  
*fertion*, to be pursued by an *Action* for *non adherence*, either before the *Commis-*  
*sars*



*saxs of Edinburgh*, or any inferior *Com-* Tit. VII.  
*missar*, to whose Jurisdiction the Parties are liable, after malicios diverting for four *Years*, they being thereupon (after due Admonition to adhere, and Citation for that effect) excommunicated; which Sentence being pronounced, is a sufficient Cause of *Divorce* \*: In which Cases the Pursuer must give his *Oath* that the *Pro-* \* R. J. 6.  
*cess* is not carried on by *Collusion*, and Par. 4.  
 after a *Decreet of Divorce* is obtained in Act 15.  
 either Case, the *Party innocent* may marry; but the *Party* that is *guilty*, cannot, and besides loses all the benefit that they could expect by the *Marriage*.

## T I T. VII.

*Of Minors, and their Tutors, and Curators.*

**W**Hilst Persons are within *twenty one* years, the Law presumes them to want that firmness of *Judgment*, which is requisite for the exact management of their Affairs; and during that time, they are called *Minors* by a general Term; *Minors*. though properly, such only are called *Minors* who are past *Pupilarity*, which lasts

Book I. in *Males* till fourteen, and in *Females* till twelve.

Definition of Tutory. *Tutory* may be defined, a *Power and Faculty* to govern the *Estates and Persons* of *Pupils*; and the *Law* gives *Tutors* and *Curators* for the *management* of their *Affairs*.

Division of Tutors. There are three kinds of *Tutors*, viz. *Tutor nominate*, *Tutor of Law*, and *Tutor dative*. *Tutore nominate*, (who is likewise called *Tutor Testamentar*) is he who is left *Tutor* by the *Father* in his *Testament*, or any other *write*, and he is not obliged to find *Caution*, or give his *Oath*, *De fideli administratione*; because it is presumed, the *Parent* hath chosen a sufficient *Person*.

The *Father* only can name *Tutors*; but if the *Mother*, or even a *Stranger*, give or dispoſe any thing to a *Child*, they may name a *Tutor* to manage what they give; but if there be no *Tutor nominate*, or if he accepts not, then there is place for a *Tutor of Law*, who is so called, because he succeeds by *Law*, and generally the nearest *Agnate* (for so we call such as are related by the *Father*) who is to succeed to the *Minor*, being past twenty five years, and would be *Heir* to him, is his \* *Tutor in Law*: He takes a *Brieff* out of the *Chan-*

Tutor of Law.

\* K. J. 3.  
Par. 7.  
Añ 32.

## Tutors and Curators.

41

*Chancery*, and serves himself before Tit. VII, any Judge, to whom it is directed, and the Tutor of Law must find Caution before he Administrate.

If he do not serve within a year after the time he might have served, then any Person may give in a Signator to the Exchequer, and he gets a gift under the Privy Seal, of being Tutor Dative, and finds caution, as in the Books of Exchequer: But of old, they found caution in the Commissar's Books: this Tutor, and he only, is obliged to make Faith, *De fidelis administratione*.

Tutor Dative.

If there be more Tutors than one, the major part must all consent; but the Pupil needs not subscribe with his Tutors, though a minor must subscribe with his Curators: But if there be a Tutor, *sine quo non*, he must always be one of the Managers and Consenters.

After the years of Pupilarity, there must be a Summons raised at the Pupil's instance, summoning some of the Father's side, and some of the Mother's side, upon nine days warning, to appear before any Judge; and at the day, the Minor gives in a List of those he intends to choose to be his Curators, and those who accept must subscribe the Acceptation, and they must

Curators.

\*

Book I. must find Caution *de Fideli* \*, upon all which, the Clerk extracts an *Act*, which  
 \* Q. Mary is called, an *Act* of Curatory: There  
 Par. 6. uses to be sometimes *Curators*, *sine quibus non*, and the major part with these  
 Act 35. are still a *Quorum*, except the *Minor* in his particular *Election* hath appointed otherwise; for the *Quorum* is in the *Minor's* Power, and the *Act* bears how many shall be a *Quorum*.

Difference betwixt Tutors and Curators, that Tutor *datur persona*, Curator *rei*; a Tutor acts and subscribes for his Pupil, a Curator with him; but both must make *Inventary* of all the Pupil's *Estate* before they administer, with consent of the nearest of Kin on both sides; and if they neglect to make *Inventary*, they will get no *Expences* allowed them during their Administration, and may be removed from their Offices as suspect \*; neither have

Inventary.

\* K. C. 2.  
 Par. 2.  
 Sess. 3.  
 Act 2.

*Salaries*: and both are liable to *Compt*, but not till their *Office* expire, as both have *Action* against their *Minors*, for what they profitably expended during their Administration, which is called *Actio tutela contraria*.

If the *Minor* have *Curators*, and do any thing without their consent to

to his prejudice; (for he may make his condition better without them, but not worse, the advantage being evident and without *hazard*) then that Act is *ipso jure null*, that is to say, he needs not *revoke*; but if he have no *Curators*, then any Act he does to his own prejudice is *valid*; but he must reduce the same thus, *viz.* he must write a *Revocation*, and subscribe it before *two Witnesses*, and *register* it, and thereupon he must raise and execute a *Summons of Reduction* of that Act, *ex capite Minoritatis, & lesionis*, before he be *25 Years of Age*, wherein he must make appear, he was both *Minor*, and was *les'd*; otherways the *Lords* will not repone him: Though this *Revocation* be not absolutely necessary, yet the *executing* of a *Summons* before *25* is absolutely necessary: and though a *Minor* swear not to *Revoke*, yet this *Oath* is declared null by *Law*, and the *Eliciter* of it punishable and infamous \*; but if he fraudulently circumvene another, by saying he was *Major*, he will not be restored against his own *Fraud*.

K. C. 2.  
Par. 3.  
Act 19.

A *Tutor* or *Curator*, cannot pursue his *Pupil* till he has counted for his *Intromissions*; for it is presum'd he has his *Pupils* Estate in his own hands, and whatever

Right

Book I. Right he buys of what belong'd to his  
 ~~~~~ Pupil, is presum'd to be bought with his  
 Pupil's Means ; and so the advantage must  
 accress to the Pupil.

So careful has our Law been to protect  
 Minors, and to secure Old Estates, that  
*minor non tenetur placitare super heredi-*  
 \* Statut. à *tate paterna* \* ; that is to say, a Minor  
 Will.c.39. is not obliged to answer any *Process* that  
 may Evict his Father's *Heritage* ; but  
 yet if his Father's Right be quarrell'd for  
 his Father's Crimes or Delicts, as in the  
 Cases of *Falshood*, *Forfeiture* or *Recog-*  
*nition* ; these Cases are excepted, and he  
 is obliged to answer. *Secundo*, This *Priv-*  
*ilege* extends not to *Actions* concerning  
*Marches*, or *division of Lands*. *Tertio*,  
 It defends not against the *Superiour*, *pur-*  
*suing* for his *Casualties*. *Quarto*, Where  
 the Minor's right is only quarrell'd *confe-*  
*quentially*, the chief right quarrell'd be-  
 longing to a *Major*, there is no place for  
 this Privilege. *Quinto*, It defends not in  
 cases where the *Heritage* was deriv'd from  
*Collaterals*, such as *Brothers* or *Uncles*.  
*Sexto*, It defends only where the *Heri-*  
*tage* descended even from the *Father* or  
*Grandfather*, if they died in peaceable  
 Possession, and if no *Process* was intended  
 against them in their own *life-time*.  
 Septimo,

*Septimo*, It takes only place, where the Father was actually *infest*; but then it is accounted *Heritage*, though it was *Conquest* by the Father. Tit. VII.


The Privilege of *Minority* is in some cases allowed to the *Minor's Heir*: Which are comprised in these following Rules.

1. If a *Minor* succeeds to a *Minor*, the time of *Restitution* is regulated by his own *Minority*, and not by his *Predecessors*.  
 2. If the *Predecessor* be *Major*, and *Intra quadriennium utile*, *restitution* is competent during the *Heir's Minority*; but he has no further of the *anni utiles*, than remained to the *defunct* the time of his *decease*.  
 3. If a *Major* succeed to a *Minor*, he has only *quadriennium utile*, after the *Minor's decease*, or so much thereof as was *unexpired* at that time. But this Privilege of *Minority* as to the *Expiring* of the *Legal of Apisings*, is *special* and *singular*; *Vide infra*, Tit. *Apisf.* and *Adjud.*

*Minority* ends in both Men and Women when they are 21 *Years of Age* compleat; but after that there are 4 *Years granted*, wherein they may reduce what they did to their *Lesion* and *Prejudice* during their *Minority*; and these *Years* are called *Anni utiles*, or *quadriennium utile*.

If

## Book I.

 If a Man be an *Idiot* or *furious*, he must be found to be so by an *Inquest*, and *Idiotry* or thereafter his nearest of *Kin* may serve *furiosity*. *themselves Tutors*; or the *Exchequer* may grant a *Tutor dative*, if they serve not; but the *Tutor in Law* will be preferred to that *Tutor dative*, offering to serve *quandocunque*, and it must be proved to the *Inquest* at the time of the Service, that he is *furious*, and when he began to be so, and all Deeds done by him after that are null, not only from the date of the service, but from the time that he was found to be *Idiot*, or \* *furious*.

\* K. J. 6.  
Par. 10.  
Act 18.

Prodigals  
and their  
Interdiction.

If a Person be *Prodigal* or *Spendthrift*, he *interdicts himself*, either *voluntarily* which is done by a *Band*, whereby he obliges himself to do nothing without the consent of such Friends as he therein condescends upon; and these are therefore called the *Interdictors*, and if this *Narrative* be false, so that the Person is not *improvident*, as he relates in the *Band*, this *voluntar Interdiction* will be reduced. *Secundo*, *Interdiction* proceeds upon a *pursuit*, at the instance of the nearest of *Kin*, against the *Prodigal* whom the *Lords* will *interdict* if they see cause: Or 3dly, Though there be no *pursuit*, yet if in another *Process* they find he has been often,  
or



or is *obnoxious* to be cheated, they will Tit. VII.  
*Interdict him, Ex proprio motu*, and these two last are called *Judicial Interdictions*; and no *Interdiction* lasts longer than the *Levity* and *Prodigality* which occasioned it; but this requires also the Sentence of a *Judg.*

Upon this *voluntar Band*, the *Lords of Session* grant *Letters of Publication*; Letters of and after these *Letters* are published at the *Mercat-Cross* of the head *Burgh* of the *Shire* where the *Person interdicted* dwells and are *registrated*, the *person interdicted* can do nothing to the prejudice of his *heritable Estate*, otherways the *Interdicters* may reduce these *Deeds* as done after the *Publication of the Interdiction*; (for *Interdictions* extend only to *Heritage*) but yet the *Person* himself is still liable to *personal Execution*, even upon these *Deeds* done after *Interdiction*.

A *Father* is likewise in *Law Administrator* to his own *Children*; that is to say, is both *Tutor* and *Curator* to them, if they fall to any *Estate* during their *Minority*, and if either *Pupil* or *Minor* have any *Legal Action* to prosecute, and want *Tutors* or *Curators*, the *Lords*, or any other *Judg* before whom the *Process* is depending, will upon a *Bill* authorize  
 Administra-  
 Law.  
 Cura-

Book I. *Curators*, who are therefore called *Curators ad lites*.

*Tutors* and *Curators* are not *Proprietors* but *Administrators*; therefore they can only *manage* rationally, and do every thing for the *Utility* of the *Pupil*, but even this *Administration* does not impower them to sell Lands, or to renounce any *heritable Right* belonging to the *Pupil*, except for paying of Debt, in which case they must have a *Decreet* for their Warrant; nor does it impower them to set *Tacks* for longer time than their office lasts: Nor can any *Tutor* be *anctor in rem suam*, by authorizing the *Pupil* to do any Deed for his own advantage, such as to become *Principal* or *Cautioneer* for him to a third Party.

Diligence  
of Admin-  
istrators,  
Pro-Tu-  
tors.

All these *Tutors*, *Curators* and *Administrators*, or any who behave as such, and who are called in our Law *Pro-Tutors*, are liable to do *exact Diligence*; and therefore if any of their *Pupil's Debtors* become *Bankrupt*, or their *Tennants* break, they are liable *in solidum*, so that the *Pupil* may pursue any one of the *Tutors* for the negligence of all the rest; but he has his Relief against the rest.

They are likewise liable to put the *Minor's Rents* out upon *Annual rent* within half

half a Year, or a Term, after they receive them, and to put out his Money upon *Annual rent* within a Year, both which times are allowed to get good *Debitors*; but if his *Bands* bear *Annual rent*, they are only obliged to take in these *Annual rents* once during their *Office*, and to turn them in a *principal Sum*, bearing *Annual rent*. Tit. VII.

After *Tutors* and *Curators* have once accepted, they cannot *Renounce*; but if they miscarry or *malverse* in their *Administration*, they may be removed by an *Action*, as suspect *Tutors*.

If there be more *Tutors* or *Curators*, the *Office* upon the Death of any of them *acccesses* to the *Survivers*, except they be named jointly; for then the first *Nomination* is dissolved by the Death of any one of them, the *Defunct* not having trusted any one; and for the same reason, if a certain number be declared a *Quorum*, the *Nomination* fails; if so many die as that this number *survives* not, nor does the *Office accress* to such as *survive*.

We have little use in *Scotland*, of *Slavery* what the *Institutions of the Roman Law* and *Patria* teach concerning *Slavery*, or *Patria potestas*. *testas*; for we as *Christians* allow no Men to be made *Slaves*, that being con-

E contrary

Book I.

trary to the *Christian Liberty* : And the *Fatherly Power*, or *Patria potestas*, has little effect with us; for a *Child* in *Family* with his *Father*, acquires to himself and not to his *Father*, as in the *Civil Law*.

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THE

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THE  
INSTITUTIONS  
Of the LAW of  
SCOTLAND.

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BOOK II.

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TITLE I.

*Of the Division of Rights, and the several ways by which a Right may be acquired.*

**B**Eing to treat in the *Second Book* of things themselves, to which we have *Right*, and how we come to have *right to them*; it is fit to know;

That *Dominium* or *Property* is the Power of *Using* and *Disposing* what is ours, except

Book II. *cept in so far as we are restricted by Law or Passion* : And the Law designing the general Good, allows us not to use our own, so as thereby chiefly to prejudg our Neighbour. *Et in emulationem vicini.*

The Property of every thing belongs to some Person or Society, and cannot flot in an uncertainty : *Nam dominium non potest esse in pendent.*

Division  
of things.

Some things do not fall under *Commerce*, and so we cannot acquire any *Property* in them, such as things common, as the *Ocean*, (though our *King* has *Right* to our narrow *Seas*, and to all the *Shores*.) *Secundo*, Things publick which are common only to a *Nation or People* ; as *Rivers, Harbours, and the Right of Fishing* in the said *Rivers*. *Tertio, Res universitatis*, which are common only to a *Corporation or City*, as a *Theater*, or the *Mercat-Place*, and the like. *Quarto*, Things that are said to be no *Man's*, but are *Juris Divini*, which are either *Sacred*, such as the *Bells of Churches*, for though we have no consecration of things since the *Reformation*, yet some things have a *Relative Holiness* and *Sanctity*, and so fall not under *Commerce* ; that is to say, cannot be bought and sold by *Private Persons*. *Quinto*, Things that are called *fan-*  
Etc ;

*Æa*; so called, because they are guarded Tit. I.  
*from the injuries of Men, by special San-*  
*tions, as the Walls of Cities, Persons of*  
*Ambassadors, and Laws. Sexto, Things*  
*Religious, such as Church-Yards.*

As to those things which fall within Ways of  
*Commerce*, we may acquire right to them, acquiring  
either by the *Law of Nature and Nations*, Property.  
or by our *Civil and Municipal Law*.  
*Dominion* or *Property* is acquired by the  
Law of Nations, either by our own *Fact*  
and *Deed*, or *Secundo*, by a *Connection*  
with, or *Dependence* upon things belong-  
ing to us; the first by a *general term* is  
called *Occupation*, and the last *Accession*.

*Occupation*, is the appropriating and apprehending of those things, which formerly belonged to none. And thus we acquire Property in wild Beasts, of which we acquire a Right how soon we apprehend them, or are in the prosecution of them with probability to apprehend them, as also we retain a Right to them whilst they remain in our possession, and even after they have escap'd, if they be yet recoverable by us. *Secundo*, Property comes by *Accession*; as for instance, a House built upon, or Trees taking root in our Ground, and the Product also of our Beasts

Book II. *Beasts* belong to us, and Ground that grows to our Ground becomes insensibly ours, and is called *Alluvio* by the *Civilians*. And it is a general Rule in Law, that *accessorium sequitur naturam sui principalis*; and yet a Picture drawn by a great Master upon another Man's Sheet or Table, belongs to the *Painter*, and not to the Master of that whereon it is drawn; the meanness of the one ceding to the excellency of the other.


Specifica-  
tion.

There are many other ways of acquiring *Right* and *Property*, which may be referred either to *Occupation* or *Accession*; as if a Man should make a *Ship* of my *Wood*, it would become the *Maker's*, and would not belong to me to whom the *Wood* belonged: and this is called *Specification*, in which this is a general Rule, that *if the Species can be reduced to the rude mass of Matter, then the Owner of the Matter is also Owner of the Species, or thing made*: as, *if a Cup be made of another Man's Silver, the Cup belongs not to the Maker, but to the Owner of the Metal*; because it can be reduced to the first *mass of Silver*: but if it cannot be reduced, then the *Species* will undoubtedly belong to him that made it, and not to the Owner of the *Matter*; as *Wine* and

*Oil*

\*



Oil made of another's *Grapes* and *Olives*, Tit. I.  
which belongs to the *Maker*, seeing *Wine*   
cannot be reduced to the *Grapes* of which  
it was made.

Property is likewise acquired when  
two or more Persons mix together in one  
what formerly belonged to them severally;  
and if the *Materials mixed be liquid*, it is  
called by a special Name, *Confusion*, as Confusion.  
when several Persons *Wines* are mixed and  
confounded together: but if the Particu-  
lars mixt be dry and solid, so as to retain  
their different Shapes and Forms, it is  
called *Commixtion*; and in both Cases, if Commix-  
tion.  
the *Confusion* or *Commixtion* be by con-  
sent of the *Owners*, the *Body* or Thing re-  
sulting from it, is common to them all;  
but if the *Commixtion* be by chance,  
then if the Materials cannot be separated,  
the thing is yet *common*; as when the  
*Grain* or *Corns* of two Persons are mixed  
together by chance, here there must ne-  
cessarily be a *Community*, because the *se-  
paration is impossible*: but if two *Flocks*  
of *Sheep* belonging to different Persons,  
should by accident mix together, there  
would be no *Community*; but every Man  
would retain right to his own *Flock*, see-  
ing they can be distinctly known and se-  
parated, and these two ways of *Acquisition*  
are by *Accession*. The

## Book II.

Tradition.

The last and most ordinary way of acquiring of Property is by *Tradition*, which is defined *a delivery of Possession by the true Owner, with a design to transfer the Property to the Receiver*; and this translation is made either by the real delivery of the thing it self, as of a *Horse*, a *Cup*, &c. or by a *Symbolick delivery*. As, is the delivery of *a little Earth and Stone in place of the Land it self*: For where the thing cannot be truly delivered, the Law allows some *Symbols* or *marks of Tradition*; and so far is *Tradition* necessary to the acquiring of the Property in such Cases, that he who gets the last Right with the *first Tradition* is still preferr'd by our Law.

Acquisitio  
per inventionem.

If he who was once *Proprietar*, does willingly quit his Right and throw it away, (which the *Civil Law* calls *pro derelicto habere*) the first finder acquires a new Right, *per inventionem*, or by finding it; by which way also Men acquire Right to *Treasures*, and to *Jewels* lying on the Shoar; and generally to all things that belonged formerly to no Man, or were thrown away by them: But it is a general Rule in Our Law, that what belongs to no Man, is understood to belong to the King.

*Prescriptio*

*Prescription* is a chief way of acquiring *Rights* by the *Civil Law*; but because that *Title* comprehends many things, which cannot be here understood, I have treated of *Prescription* amongst the ways of losing Rights, it being upon divers Considerations, *Modus acquirendi & amittendi*.

We also acquire right to the *Fruits* of those things which we possess, *bona fide*, if these *Fruits* were gathered in or up-  
lifted, and consumed by us whilst we thought we had a good Right to the thing it self: for though thereafter our Right was found not to be good, yet the Law judged it unreasonable, to make us restore what we look'd upon as our own when we spent it; and therefore when this *bona fides* ceaseth, which may be several ways, especially by *intent*ing an Action at the *true Owner's instance*, we become answerable for these *Fruits*; though thereafter they be *percepti & consumpti* by us.

Tit. I.

Prescription.

TIT.



## T I T. II.

*Of the Difference betwixt Heritable  
and Moveable Rights.*

**H**AVING in the former Title cleared  
how we acquire Rights, we come now  
to the Division of them.

The most comprehensive *Division of Rights* amongst us, is that whereby they are divided into *Heritable* and *Moveable Rights*.

Heritable  
& moveable  
Rights.

*Heritable Rights* in a strict sense, are only *Lands*; and all Sums of Money, and other things which can be moved from one place to another, are *moveable*: but that is only counted *Heritable* in a *Legal Sense*, which belongs to the *Heir*, as all other things which fall to the *Executor* are *moveable*; and so Sums of Money, albeit of their own nature they are *moveable*, yet if they were lent for *Annual Rent*, they were of old reputed *Heritable*.

Annual  
Rent.

For understanding whereof it is necessary to know, that albeit by the *Canon Law* all *Annual Rents* were forbidden, as being contrary to the Nature of the thing, (Money being barren of its own Nature:) yet the Reformed Churches do generally allow

allow it; nor were the *Jews* prohibited Tit. II.  
to take *Annual Rent* from *Strangers*.

Before the Year 1641. all *Bands* and *Sums* bearing *Annual Rent* were heritable as to all effects, so that the *Executor* who is *Heres in mobilibus*, had no interest in, nor share of such *Bands*, but they belonged intirely to the *Heir*; but that *Parliament* finding that the rest of the *Children* beside the *Heir*, had no Provision by our Law, except an equal share in the *Moveables*; they therefore ordain'd that all *Bands* for *Sums* of *Money* should be moveable, and so belong to the *Executors*; except either the *Executors* were seclued, or the *Debitor* were expressly obliged to infest the *Creditor*, which is likewise renewed since the *King's Restauration* \* : For in these cases, it was clear, that by the destination of the *Defunct*, (which is the great *Test* in this Case) these *Sums* were to be *Heritable*; and yet all *Sums* bearing *Annual Rent*, are still heritable in so far as concerns the *Fisk*, or the *Relict*: so that if a *Band* bear *Annual Rent* to this day, the *Fisk* cannot claim any right to it, as falling under the *Rebel's single Escheat*, (whereby when he becomes *Rebel*, all his *Moveables* fall to the *King*;) nor has the *Relict* any Right to a

third

*Bands* Heritable and Moveable.

\* K. C. 2.  
Par. 1.  
Act 32.

Heritable  
quoad Fiskum &  
Relictum.

Book II. *third of them, as she has to a third of other Moveables, the Law having presumed that Relicts will be still sufficiently secured by their Contracts; but whether the Sum be heritable or moveable, all the by-gone Annual Rents, and generally all by-gones are moveable as to all intents and purposes, and so fall to Executors, and to the Fisk, and to the Relict; because by-gone Rents are look'd on as Money lying by the Debitor, they being already payable, as all Obligations bearing a tract of future time belonging to the Heir.*

Sums Heritable by Destination.

So far does the Law defer to the will of the Proprietar, in regulating whether a Sum should be *heritable* or *moveable*; (the Law thinking that every Man is *best Judge* how his *Estate* should be bestowed;) that if a Man *destinate* a Sum to be employed upon *Land* or *Annual Rent*, this Destination will make it *heritable*, and to belong to his *Heir*; or though the Sum was originally secured by a *moveable Band*, yet it may become *heritable* by the *Creditor's* taking a *supervening heritable security* for it, or by comprising for his security. But yet the *Creditor's design* is more to be considered than the *supervening Right*; as for instance, a Sum may be *moveable ex sua natura*, and yet may

may be secured by an *heritable Surety*; as in the Case of by-gone *Annual Rents*, due upon *Infestment of Annual Rent*, which are unquestionably *moveable* of their own Nature, and yet they are *heritably* secured; and even *Executors* may recover them by a real Action of *Poynding* of the Ground. And, if a *Wedset* bear a *Provision*, that notwithstanding of *Requisition*, the *Wedset* shall still subsist, the *requisition* will make the Sum *moveable*, though it continue secured by the *Infestment*; as also Sums *ab initio heritable*, may be secured by an *accessory moveable security*, without altering their Nature; as for instance, if one take a *Gift of single Escheat* for securing himself in *heritable Sums*, this does not alter the *Nature* of the former *heritable Right*.

Though a Sum be *heritable*, yet if the *Creditor* to whom it is due require his *Money*, either by a *charge* or *requisition*, it becomes *moveable*; for the *Law* concludes in that case, that the *Creditor* designs rather to have his *Money*, than lying in the *Debitor's hands* upon the former security; and if it were lying in *Money* beside him, it would be *moveable*: and a *requisition* to one of the *Cautioners* will make it *moveable*, as to the *Principal* and

||

all

Book II. all the other *Cautions*: But a charge on a *Band* wherein *Executors* are *secluded*, will not make the Sum *moveable*; for the *design* of the *Creditor* is *presumed* to *continue* in *favours* of the *Heir*, till the Sum be paid; or the *Band* *innovated*: And for the same reason, a *requisition* used by a *Wife*, who has an *heritable* Sum that falls not under the *Jus Mariti*, will not make it *moveable*, since it is *presumed* she *designed* only to get *Payment*, but not to give it to her *Husband*.

But if the *Creditor* who required his Money take *Annual Rent* after that *Requisition*, it is *presum'd* that he again altered his *Inclination*, and resolved to have it *heritable*, and to *continue* due by *virtue* of the first *Security*.

Though a *Band* be *heritable* as bearing *Annual Rent*, yet before the *Term of Payment* it is *moveable* as to all *Persons*.

From all which it is clear, that some Sums are *moveable* as to the *Executor*; but not as to the *Fisk* or *Relict*; and some may be *moveable*, as to the *Debitor* and his *Executors*, and yet may be *heritable* as to the *Creditor* and those representing him; as for *instance*, an *Obligation*, to *imply* a Sum due by a *moveable Band*, upon



upon *Land* or *Annual Rent* for the *Heir's Tit. III.*  
of a *Marriage*, that Sum as to the *Creditor* would be *heritable*, yet *quoad* the  
*Debitor*, it would remain *moveable*.

T I T. III.


*Of the Constitution of Heritable Rights,  
by Charters and Seafins.*

**H**AVING treated in the former Chapter  
of the difference betwixt *Heritable*  
and *Moveable Rights*, it is now fit to begin  
with *Hereditary Rights*, as the more  
*Noble*.

Our *Heritable Rights* are regulated by  
the *Fendal Law*, by which *Feudum*, which *Feudum*  
we call a *Few*, was defined to be a *free*  
and *gratuitous Right* to *Lands* made to one  
for *Service* to be performed by him: He  
who grants this *Few*, is in *Our Law* cal-  
led the *Superiour*; and he to whom it was  
granted, is called the *Vassal*: the *Super-*  
*riour's Right* to the *Fie* is called *Domi-*  
*nium directum*, and the *Vassal's Right* is  
called *Dominium utile*; and if that *Vassal*  
dispone the *Land* to be holden of himself,  
then that other *Person* who receives that  
*Few*, is called the *Sub-vassal*; whereas  
the

Superior  
& Vassal.

Dominium  
directum &  
utile.

Book II. the *Vassal* who granted the *Few*, becomes  
 the immediate *Superiour* to this *Sub-*  
*Sub-vassal*. *vassal*, and the *Vassal's Superiour* becomes  
 the *Sub-vassal's* mediate *Superiour*, and  
 is so called because there is another *Superiour* interjected betwixt him and the  
*Sub-vassal*.

The *Superiour* disposes ordinarily this  
*Few* to be holden of him by a *Charter*  
 and *Seisin* : The *Charter* is in effect the  
 disposition of the *Few* made by the *Superiour*  
 to the *Vassal* ; and when it is first  
 granted *Charter*, it is called an *Original*  
*Charter* or *Right* ; and when it is renewed,  
 it is called a *Right* by *Progres*s, and pro-  
 ceeds either upon *Resignation* when the  
 Lands are resigned in the *Superiour's* hands  
 for new *Infeſtment*, either in favours of  
 the *Vassal* himself, or of some *third Party*,  
 or by *Confirmation*, when the *Superiour*  
 confirms the *Right* formerly granted ; and  
 if it is to be holden from the *Disposer* of  
 the *Superiour*, that is called *à me*, and is a  
 publick *Right*, and is still drawn back to  
 the date of the *Right* confirmed : But if  
 the *Confirmation* be only of *Rights* to be  
 holden of the *Vassal*, it is called *de me*,  
 and is a base *Right*, the effect of this  
*Charter* being to secure against *Forfeiture*  
 or *Recognition* of the *Superiour*, all  
 which

which are voluntar *Rights* ; but if they be granted in obedience to a *Charge* upon *Apprising* or *Adjudication*, they are necessary.

If the *Charter* contains a Clause *de novodamus*, then it has the Effect of an *Original Right*, and secures against all Casualties due to the *Superiour*.

In *Charters*, the first thing expressed is for what Cause it was granted, and if it was granted for Love and Favour, *Our Law* calls that a *Lucrative Cause*, or for a Cause onerous and lucrative. Price, and good Deeds ; this we call an *Onerous Cause*.

The second thing considerable in a *Charter*, is the *dispositive Clause* which contains the Lands that are disposed ; and regularly with us, the *Charter* will give Right to no Lands but what are contained in this Clause, though they be enumerated in other places of the *Charter*.

The third *Clause* is that wherein is expressed the way how the Lands are to be holden of the *Superiour*, and this is called the *Tenendas*, from the first word of the *Clause*.

The fourth *Clause* is that which expresses what the *Vassal* is to pay to the *Superiour*, and this Duty is called the *Red-*

F

*rendo*;

Book II. *dendo*, because the *Clause* whereby it is payable begins, *Reddendo inde annuatim*.

Warrantice Personal and Real.

Simple Warrantice.

Warrantice from Fact and Deed.

Absolute Warrantice.

Real Warrantice.

The fifth *Clause* is the *Clause of Warrantice*, which is either *Personal* or *Real*; *Personal Warrantice* is when the *Author* or *Disposer* is bound personally, and is either *simple Warrantice*, which is only from *subsequent* and *future Deeds* of the *Granter*; and this *Warrantice* is implied in *pure Donations*. Or *Secundo*, *Warrantice* from *Fact* and *Deed*; which is, that the *Granter* hath not done, or shall not do any *Deed prejudicial to the Right warranted*. Or *Tertio*, *Warrantice* is *absolute*, and that is, to warrant against all *Mortals*: and in *absolute Warrantice*, this is a rule, that an *Adequate onerous Cause* presumes still *absolute Warrantice*; but *absolute Warrantice in Assignations* imports only that the *Debt* is truly due, and not that the *Debtor* is solvent.

All Rights granted by the King are presumed to be *Donations*, and import no *Warrantice*.

*Real Warrantice* is when *Infeftment* of one *Tenement* is given in security of another.

The effect of *Warrantice* is, that if the thing warranted be taken away, there is competent to the Party, to whom the

\*

the

the Warrantice is granted, an *Action of Tit. III. Eviction.*

As *Warrantice* infers relief, so *Excambion* infers *regress*; that is to say, the Party from whom the *excambed Lands* are evicted, either by a Deed of the *Excambier* or a defect of the Right, has *regress and recourse to the Lands which he excambed with the Lands which are evicted*: And this arises from the nature of the *Excambion* without express paction, and is competent too, as well as against the singular Successors of *Excambiers* and their Heirs.

Because *Tradition* is requisite to the Precept of compleating of all Rights; therefore the *Seafin*. Charter contains a Command by the *Superiour* to his Bailly; to give *actual State and Seafin* to the *Vassal*, or to his *Attorney*. By *tradition of Earth and Stone*, and this is called the *Precept of Seafin*, and upon it the *Vassal*, or some other Person, having a *Procuratory* from him, gets from the *Bailly Earth and Stone* delivered in presence of a *Notar* and *two Witnesses*, which *Instrument* is called a *Seafin*. And *Seafin*. if the *Superiour* gives *Seafin* himself, it is called a *Sefin*, (*propriis manibus*;) so that *Seafin* a *Formal Seafin* is the *Instrument of a No-* *propriis manibus*. *tar, bearing the delivery of Earth and*


Book II. *Stone, or some other Symbols by the Superiour, or his Bailly to the Vassal, or his Atturney: The Tenor whereof is known and fix'd, and now by a late Statute the*  
 \* K. C. 2. *Witnesses must subscribe the Instrument \**;  
 Par. 3. *and thus the Vassal stands Infeft in the*  
 Act. 5. *Land by Charter and Seasin.*

This *Seasin* being but the *Affertion of the Notar*, proves not; except the warrant of it; that is to say, the *Precept* or *Disposition* whereon it proceeded be produced; but a *Seasin* given by a *Husband* to his *Wife*, or by a *Superiour* to his *Vassal*, *proprits manibus* (without a *Precept*) is sufficient, when the *competition* is with the *Granter's* own *Heirs*, or with no more *solemn Rights*; and is not exorbitant, and after 40 *Years* there is no necessity to produce either *Precept* of *Seasin*, or *Procuratory* of *Resignation* by a special *Statute* \*.

\* K. J. 6.  
 Par. 14.  
 Act 214.

This *Seasin* must be registered within 60 days, either in the general *Register* at *Edinburgh*, or in the particular *Register* of the *Shire*, *Stewartry*, or *Regality* where the Land lyes, † else the Right will not be Valid against a *singular Successor*; that is to say, if any other Person Buy the Land, he will not be obliged to take notice of that *Seasin*; but the  
 Right

† K. J. 6.  
 Par. 23.  
 Act 16.

Right will still be good against the Gran- Tit. III.  
ter and his *Heirs*. 

If *Lands* lye *Discontigue*, every *Tenement* must have a special *Seafin*, except they be *united* in one *Tenement*, and then one *Seafin* serves for all ; if there be a special place exprefs'd where *Seafin* should be taken ; but if there be no place exprefs'd, then a *Seafin* upon any part will be sufficient for the whole *Contiguous Tenements*, (these being naturally united ;) but will not be sufficient for *Lands*, lying *discontigue* : And one *Seafin* will serve for all *Tenements* of one kind, but where they are of several kinds, as *Lands*, *Milns*, or holden of different Superiours, or by a different holding of the same Superiour, these (though *contiguous*) will require several *Seafins* : The *Symbols* of Possession being different, for *Lands* pass by the *Tradition* of *Earth* and *Stone*, and *Milns* by the *clap* and *happour*.

Sometimes *Lands* are erected into a *Barrony*, (the nature of which is explained Erection before, Tit. Inferiour Judges) and when- in a Bar-  
soever this is granted, *Union* is implied as rony.  
the lesser degree.

Erection in a *Barrony* can only be by the *King*, and is not *Communicable* by any *Subaltern Rights*, albeit the whole

Book II. *Barrony* be disposed, though the *Union* may be thereby *Communicated*.

This *Union* can only be granted by the *King*, which he may grant either *Originally*, or by *Confirmation*; and being so granted, it may be *transmitted* by the *Receiver* to a *Sub-Vassal*; but if a part of the Lands united be disposed, the whole *Union* is not dissolved, but the Part disposed only; and this *Union* and all other Privileges and Provisions can only be granted in the *Charter*, but not in the *Seasin*.

Real Rights being thus established by *Charter* and *Seasin*, are not affected or burdened by *Back Bands*, or other personal Declarations; so that singular Successors are not obliged to take notice of them; but till they are so compleated, such Declarations (though personal) do affect them, and are valid against singular Successours: But they affect personal Rights, such as *Bonds* or *Contracts*, even though they be not intimated.

TIT.



## TIT. IV.

*Of the several Kinds of Holding.*

**T**He first *Division of Feus* from the *several kinds of Holding*, is, that some Lands hold *Ward*, some *Few*, some *Blench*, and some *Burgage*. Division of Feus.

For understanding *Ward-holdings*, it is *Ward*, fit to know, that at first all *Feus* were Rights granted by the *Longobards*, and the other *Northern Nations* (when they conquer'd *Italy*) to their own Souldiers for Service to be done in the *Wars*; and therefore *Ward-holding*, which is the *propereft Holding*, is called *servitium militare*; and all Lands are therefore presumed to hold *Ward*, except another holding be exprefs'd; and *servitium debitum & consuetum*, is interpreted to be *Ward-holding*.

The Advantages arising to the *Superiour* by the *specialty of this Holding* are, that the *Superiour* has thereby the full *Meals* and Duties of the *Ward Lands*, \* Q. Mary during the Years that his *Male-Vassal* is *Minor* \*; for the *Few* being given originally to the *Vassal* for *Military Service*, Par. 3.  
Act 5.  
R. Ja. 6.  
Par. 2.  
it Act 42.

Book II. it returns to the *Superiour* during *Minority*; because the Law presumes, that the *Minor* is not able to serve his *Superiour* in the *Wars*; but in *Female Vassals*, this *Casualty* lasts only till 14 *Years* compleat; because they may then marry *Husbands*, who may be able to serve the *Superiour*, and this properly is called the *Casualty of Ward: for Marriage*, is due in other *Holdings*, as shall be cleared in the next *Title*.

Sometimes the *Superiour* is content to accept a *liquid quota*, or *annual prestation*, in place of the *Meals* and *Duties* that fall to him by the *Ward*, and this *Holding* is called *Taxt-ward*: The *Marriage* is also *taxt* in that *Case* to a particular *Sum*; but though these *Taxt-ward* and *Taxt-marriage Duties* become *debita fundi*, they being express'd in the *Reddendo*; yet because the *Holding* remains still a *Ward-holding*, therefore *Lands* holding *Taxt-ward* recognise, if they be disposed without consent of the *Superiour*. When a *Vassal* holds immediately *Ward* of the *King*, and a *Sub-vassal* holds *Ward* of that *Vassal*, this is call'd *Black Ward*, or *Ward upon Ward*.

Feu-holding.


*Feu-holdings* is that whereby the *Vassal* is obliged to pay to the *Superiour* a *Sum* of

of Money yearly, in name of *Feu dutie* Tit. IV.  
*nomine Fendi firmæ.*

This Holding has some Resemblance with the [*Emphyteosis*] in the Roman *Emphy-Law*, but it is not the same with it; for *teosis*, *Emphyteosis* was a perpetual Location, containing a Pension, as the hire which was granted, for improving and cultivating barren Ground; but our *Feu-holding* comes from the *Feudal Law*, (whereof there is no vestige in the *Civil Law*) and passes by *Infeiment* to *Heirs*.

*Blench-holding*, is that whereby the *Blench-Vassal* is to pay an *Elusory Duty*, meerly *holding*, for acknowledgment, as a *Penny*, or a pair of *Gloves*, *nomine albe firmæ*, and ordinarily it bears, *si petatur tantum*.

These *Blench Duties* are not due, whether they be of a yearly growth, or not, except they be required yearly by the *Superiour* \*, as for instance, if the \* K. Ja. 6.  
*Blench Duty* be yearly Attendance at Par. 18.  
 such a Place, or a Rose yearly, the Su- A<sup>c</sup> 14.  
 perieur can seek nothing for his *Blench Duties*, except he required the same within the Year: But the *Exchequer* now puts a Value upon every *Blench Duty* that can be estimated, such as *Gloves* or *Spurs*, and exacts them for all by-gone Years within *Prescription*; though

Book II. though they be not required yearly.  
 *Burghage-holding*, is that *Duty* which  
*Burghs Royal* are obliged to pay to the  
*King*, by the *Charters*, erecting them in  
a *Burgh Royal*, and in this the *Burgh*  
is the *Vassal*, and not the particular  
*Burgesses*; and the *Bailiffs* of the *Burgh*  
are the *Kings Bailiffs*: nor can *Seafin*  
in *Burghage Lands* be given by any other  
than the *Bailly*, and *Town-Clerk* \*, if  
the *Town* have any, and they must  
be *Registrated* in the *Town-Clerk's*  
*Books* †.

\* K. J. 6.

Par. 1.

Act 27.

† K. C. 2.

Par. 3.

Act II.

Mortifica-  
tion.

When Lands are Mortified (which we  
call *ad manum mortuam*) to Churches,  
Hospitals, or other Pious Uses; the So-  
ciety to which the Mortification is made,  
becomes *Vassal*, and the *Reddendo* being  
only *Præces & Lachrymæ*, and the So-  
ciety never dying, the Superiour loses  
many Casualties of the Superiority;  
wherefore Lands cannot be mortified  
without the Superiour's consent.

TIT.



## T I T. V.

*Of the Casualties due to the Superiour.*

THE *Few* being thus stated by the *Superiour* in the *Person* of his *Vassal*, it will be fit in the next place, to consider what Right the *Superiour* retains, and what Right the *Vassal* acquires by this Constitution of the *Few*.

The *Superiour* retains still *dominium directum* in the *Few*, and the *Vassal* has only *dominium utile*, and therefore the *Superiour* is still infeft as well as the *Vassal*; But the *King* needs not be infeft, for he is infeft *jure Corona* in all the Lands of *Scotland*; that is to say, his being *King* is equivalent to an Infeftment.

The *Superiour* has different Advantages and Rights, according to the different manner of *Holdings*; and there are some Rights and Casualties common to all *Holdings*.

*Ward-holdings* gives the *Superiour* a Right to the Meals and Duties of his *Vassal's* Lands, during all the Years that his *Vassal* is *Minor*; and this is properly called the *Casualty* of *Ward*; but the  
*Superiour*

Book II. *Superiour* or his *Donatar* are obliged to entertain the *Heir*, if he have no other *Feu* or *Blench Lands*, and to uphold the House, Parks, &c. in as good condition as they found them; and must find Caution for that Effect \*.

\* K. J. 4.

Par. 3.

A<sup>c</sup>t 25.

K. Ja. 5.

Par. 4.

A<sup>c</sup>t 15.

Recogni-  
tion.

\* Statuta

Rob. 3.

cap. 19.


If the *Vassal* sells or disposes the half of his *Ward-Lands* to any except his *appearand Heir*, who is *alioqui successurus*, without the consent of his *Superiour*, the whole *Ward-Lands* fall to the *Superiour* for ever; and this we call \* *Recognition*, which is introduced to punish the ingratitude of the *Vassal*, who should not have disposed the Lands which is presumed he got gratuitously from the *Superiour* without his own consent; and to shun this, the *Vassal* in *Ward-Lands* gets the *Superiour's Confirmation* before he takes *Infeſtment*; for if he take *Infeſtment* before he be confirmed, the *Land's recognosce*, as said is; since the *Vassal* shows sufficiently his ingratitude by the very taking of the *Infeſtment*. But if the *Seisin* be null in it self, it infers no *Recognition*; because in that case there is no Right transmitted.

And though the *Vassal* at first did not sell the half without the *Superiour's* consent; yet, if he thereafter sells as much

as

## to the Superiour.

77

as will extend to more than the half of Tit. V.  
the *Fen*, the *first Buyer* will likewise   
lose his *Right*, if it was not *Confirmed*  
before he took *Infeftment*. And this  
holds even where the Lands are but *Wad-*  
*set*, though the *Back-Tack Duty* does not  
extend to the equal half of the value of the  
Lands, if the Lands *Wadset* exceed the  
major part of the Tenement: But *alie-*  
*nation* of Teinds, infers not this *Casua-*  
*lity*, because they are not *holdenward*.

Not only a *Confirmation* or *Novada-* Novada-  
*mus*, if it exprefs *Recognition*; but the mus.  
*Superiour* accepting *Service*, or pursuing  
for the *Casualties*, or accepting right  
from the *Vassal* posterior to the Deeds  
inferring *Recognition*, are a passing from  
the *Recognition*, because they infer the  
*Superiour's* Acknowledgment of the *Vas-*  
*sal's Right*. And *Inhibition* raised and  
executed before the *Recognition* be incur-  
red, fecures againft the fame by a late  
*Statute* \*.

\* K. Ja. 7.  
Par. 1.  
A& 4.

*Recognition* takes place in *Taxt-Ward*  
as well as *Simple-Ward*, but in no other  
manner of Holding, except the fame be  
exprefly provided in the *Vassal's Charter*,  
for *Ward-holding* is presumed to be the  
only proper *Feudal Right*.

\*

If

Book II.


 Disclama-  
tion.

\* Statuta

Rob. 3.

cap. 18.

Reg. Ma-

jest. lib. 2.

cap. 63.

Par. 6.

Act 9.

 Avail of  
the Mar-  
riage.

 The single  
and double  
Avail of  
the Mar-  
riage.

If the *Vassal* denieth the *Superiour*, he loses his *Few*, and this is called *Disclamation* \* ; but any probable ground of *Ignorance* will take off this *Forfeiture*.

If the *Vassal* who holds *Ward-Lands* dies, having an *Heir Unmarried*, whether *minor*, or *major*, the *Superiour* gets the value of his *Tocher*, though he offer him not a *Woman* to be his *Wife* ; but if the *Superiour* offer him his *Equal* for a *Wife*, and he refuses to accept her, and Marries any other Person ; the *Superiour* gets the double of his *Tocher*, and one of these *Casualties* is called the *single Avail of the Marriage*, and the other the *double Avail of the Marriage* ; but the *Modification* of this is referr'd to the *Lords of Session*, who consider still what was the *Vassal's* free *Rent*, all Debts deduced, and the ordinary *Modification* of the *single Avail* is about two *Years Rent* of the *Vassal's* free *Estate*, even though the *Heir* was *Here-trix* ; and the *double Avail* is but a Year more, which is three *Years free Rent* : And though there were moe *Heirs Portioners*, there will only one *Avail* be due for them all.

Though this *Casualty of Marriage* be still due in all *Ward-holdings*, yet they may be due by *expres*s *Paction* in other *Holdings*,



*Holdings*, and there are many in Scotland Tit. V. who hold their *Lands Feu, cum maritagio*; and in both Cases, the *Marriage* is *debitum fundi*.

Though as to the *Casualty* of *Ward*, every *Superiour* has Right to the *Ward-Lands* holding of himself where the *Vassal* holds *Ward-Lands* of more *Superiours*; yet the *Casualty* of *Marriage* falls only to the *eldest Superiour*, because there cannot be more *Tochers* than one, and he is the *eldest Superiour* from whom the *Vassal* had the first *Feu*; but the *King* is still presumed to be the *eldest Superiour*, because all *Feu* originally flowed from him.

It is thought that the Reason why this *Casualty* is *due*, was because it was not just that the *Vassal* should bring in a Stranger to be *Mistress of the Feu*, without the *Superiour's consent*; for else he might choose a *Wife* out of a Family that were an Enemy to the *Superiour*; but I rather think that both *Ward* and *Marriage*, proceeded from an *express Passion* betwixt King Malcome Kenmore and his Subjects, when he first *fenced* out the whole *Lands* of Scotland amongst them; as is to be seen in the first of his *Statutes* \*.

\* Leg. Mil.  
col. cap. 1.

The

Book II. The special Duty arising to the *Superiour* in a *Feu-holding* is, that the *Superiour* gets a yearly *Feu Duty* payed to him, and if no part of this *Feu Duty* be payed for three Years, then the *Vassal* loses his *Feu*, *ob non solutum Canonem*; for the *Feu Duty* is called *Canon*; and if this Provision be express'd in his *Charter*, he will not be allowed to Purge this *Irritancy*, by offering the by-gones at the *Bar*; but though this *Provision* be not express'd in the *Charter*, yet the *Feu* will be annulled for not payment of the *Feu-duty*, by an express Act of Parliament \*; but the *Vassal* in that Case will be allowed to purge at the *Bar*, and the reason of this difference is, because the *express Paction* is thought a stronger Tye than the *meer Statute*.

\* K. J. 6.  
Par. 15.  
Act 246.

Clause ir-  
ritant.

Clause re-  
solute.

A *Clause irritant* in our *Law*, signifies any *Provision* which makes a *Penalty* to be incurred, and the *Obligation* to be null for the future; as where the *Superiour* gives out his *Feu* upon *express Condition*, that if the *Feu-duty* be not payed, the *Feu* shall be null and *reduceable*, and a *Clause resolute* is a *Provision* whereby the *Contract* to which it is affix'd, is for not *Performance*, declared to have been null from the beginning.

The

The *Casualties* that are due by all Tit. V. manner of *Holdings*, and which arise from the very *Nature of the Fee*, without any *exprefs Paction*, are *None-entry*, *Relief*, and *Life-rent Escheat*.

*None-entry*, is a *Casualty* whereby the *None-Superiour* has Right to the Meals and Duties of the Lands, when there is not a *Vassal* actually entered to the Lands, or where the *Vassal's* Right is reduced after he is entered; and the reason why this is due to him, is, because he having given out his *Fee* to his *Vassal* for Service, when there is no *Vassal* entered, the Law allows him to have recourse to his own *Fee*, that he may therewith provide himself a *Vassal* who may serve him: but though the full Rents of the Lands be due to the *Superiour*, from the very time that he cites his *Vassal* to hear and see it found and declared, that the Lands are in *None-entry*; yet before that *Citation*, the *Superiour* gets only the *Retoured Duties*; and the reason of the difference is, because after *Citation* there is a greater contempt than before, and so is to be more severely punished.

For understanding which *retoured Duty*, it is fit to know, that there was of old a *general valuation* of all the Lands

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of

Book II. of Scotland; but thereafter there was a new valuation, the first whereof is called the old, and the second the new Extent, and both are call'd the retourn'd Duty, because they are express'd in the Retour (or Return) that is made to the Chancellery when an Heir is served; but both are very far below the Value, to which Lands are now improved, though in Our Law the new Extent be constructed to be the value: But if the Lands be not retoured, the Donatar to the None-entry, will have Right to the full Meals and Duties even before Citation: The old Extent is said to be made *tempore pacis*, and the new Extent *tempore belli*; and the most probable reason of these terms is, that the first Valuation was very mean, being made in time of Peace: But our Kings being engag'd thereafter in War with the English, there was a new Valuation made much greater than the first, to augment the Revenue for maintenance of the War: And therefore the new Extent or Valuation is said to be made *tempore belli*.

But in an Infeftment of Annual Rent, the whole Annual Rent is due, as well before Declarator, as after; because the whole Annual Rent is the retoured Duty, it being retoured, *valere seipsum*; and that

that is called an *Infeiment of Annual Rent*, when the *Vassal* is not infeist in the *Property* of the particular *Lands*; but is infeist in an *yearly annuity of Money* to be paid out of the *Lands*; as for instance, if a *Man* should be infeist in the *Sum of Five hundred Merks yearly*, to be payable out of any particular *Lands*, being worth 500 Merks yearly, how soon the *Vassal* who had right to the 500 Merks died, the *Superiour* would have right to the whole *Annual Rent* yearly, until the *Heir* of the *Vassal* be entered. *Vide infra Tit. Redeemable Rights, S. Annual Rents.*

Tit. V.  
Infeiment  
of Annual  
Rent.

There is no *None-entry* due in *Burgage Lands*; because the *Burgh* it self is *Vassal* and never dies; and so therefore neither does the *Burgh* nor any private *Burgeses* pay *None-entry*, the Duty payable by the *Burgeses* being only *Watching and Warding*: And yet their *Life-rent*, as well as *single Escheats*, falls to the *King*. The *None-entry* subsequent to the *Ward*, is of the nature of the *Ward*; and if the *Superiour* or *Donatar* were in possession, they have right to the full *Meals and Duties* without any *Declarator*; but in that case the *Donatar's Right* extends only to three *Terms* subsequent to the *Ward*,

Book II. after which there is place to a *Second Donatar*.

Relief.

When the *Vassal* enters, he pays an acknowledgment to the *Superiour*, which is called *Relief*; because it's payed for relieving his *Land* out of the *Superiour's* hands. It is *debitum fundi*, and affects not only the *Ground* really, but the *Vassal* personally, who takes out the Precept for infefting himself; though he never takes *Infeftment* thereupon.

The value of this *Casualty* varies, according to the nature of the Holding; for in *Blench* and *Feu-holdings*, it is only the double of the *Feu* or *Blench-duties*; but in *Ward-holdings*, it is the full Duty of the Land, if the *Superiour* be in possession the time of the *Vassal's* entry; but if the *Superiour* was not in possession, even though the *Vassal* was *minor*, then the *Superiour* gets only the *retoured* Duty; and it is so far from being presumed to be remitted by the *Superiour's* entering his *Vassal*, that it is still exacted by the *Exchequer*, though it be gifted with the other *Casualties*.

Life-rent  
Escheat.

For understanding *Life-rent Escheats*, it is fit to know, that when any Man does not pay a *Debt*, or perform a *Deed* conform to his *Obligation*, his *Obligation* is regi-

*registrated* ; if it carry a *Consent* to the *Tit. V.*  
*Registration* in the Body of it, or if it do not, there must be a *Sentence recovered*, and upon that *Registrated Writ* or *Decreet* ( for a *Registrated Writ* is a *Decreet* in the *Construction of Law* ) there will be *Letters of Horning* raised, and the *Party* will be charged ; and if he pay not within the days allowed by the *Charge*, he will be *denounced Rebel*, and put to the *Horn*, and from the very date of the *Denunciation*, all his *Moveables* fall to the *King* by a *Casualty*, which is called *single Escheat* ; but now *single Escheats* fall likewise to *Lords of Regalities*, if the *Persons denounced* live within a *Regality* ; because the *King* uses to gift all *single Escheats* at the *Erection* : But if they be not expressly gifted, they remain with the *King*. Single Escheats.

Under the *single Escheat* fall all Sums that are moveable *quoad Fiscum*, and all by-gone Annual Rents even of heritable Sums, and the by-gone Rents of Lands, together with the Crop that is upon the Ground the time of the *Rebellion*, and the Meals and Duties due at the Term, immediately subsequent to the *Rebellion*.

If the *Vassal* continue year and day *Rebel*, without *relaxing* himself, (which

Book II.

Relaxa-  
tion.

*Relaxation* is expedit by *Letters* under the *King's Signet*, expressly ordaining him to be *relaxed from the Rebellion*; then he is esteemed as *civilly dead*; and consequently not being able to serve the *Superiour*, the Law gives the *Superiour* the *Meals* and *Duties* of his *Few*, during all the days of the *Vassal's* life; and this *Casualty* is called *Life-rent Escheat*: so that every *Superiour* as well as the *King*, has right to the *Meals* and *Duties* of the

\* K. Ja. 5. Lands holden of himself \* if his *Vassal* was once infest; and even though he was not infest, if he was *appeare and Heir*, and might have been infest, for his lying out should not prejudg his *Superiour*; but if a Man have Right by Disposition, whereupon no Infestment followed, the *King* only will have Right to his *Life-rent Escheat*, since the *singular Successour* not being yet infest by the *Superiour*, of whom he is to hold his Lands, that *Superiour* cannot have Right, and consequently their *Life-rent* falls to the *King*; and the *Life-rent* of *Ministers*, in so far as concerns their *Manses* and *Gleibs*, falls also to the *King*, because they require no Infestment, and are not holden of any other *Superiour*: but all *heritable* and *Life-rent Rights* requiring no Infestment

\* K. Ja. 5.  
Par. 4.  
Act 32.

\*

of



of their own Nature, such as a *Terce*, Tit. V. and *Life-rent-tacks*, fall not to the *King*, and *Life-rent-tacks* fall to the *Master of the Ground*, and the *Life-rent* by *Terce* pertains to the *Superiour* during the *Life-renter's* life-time \*.

\* K. J 6.

Par. 22.

A &amp; 15.

This *Life-rent Escheat* comprehends only *Rights*, to which the *Vassal* himself had right for his *Life-time*, for else it will fall under *single Escheat*, (*single Escheats* comprehending every thing that is not a *Life-rent Escheat*) and therefore if the *Superiour* having Right to the *Vassal's Life-rent Escheat*, become *Rebel* himself, the *Vassal's Life-rent Escheat* will fall under the *Superiour's single Escheat*, for the *Superiour* had not Right to those *Meals* and *Duties* during all the days of his own *Life-time*; and so it could not fall under his *Life-rent*: and the like does for the same reason hold in all such as have Assignations to *Life-rents*, or to *Life-rent Escheats*, or to *Tacks* for any definite number of Years, few or many.

The *Superiour* has also Right to the *Sub-vassal's Life-rent Escheat*, which falls after the *Vassal's Denunciation*; for by the *Denunciation of the immediate Vassal*, the *Superiour* comes in his place, and

Book II. so has Right to the *Sub-vassal's Life-rent* :  
 But if the *Sub-vassal* be first denounced,  
 his *Life-rent* falls under the *Vassal's single Escheat*.

The *Life-rent Escheat* falls by the *Rebellion*, that is to say, by the *Denunciation* ; and the Year and Day is given only to the *Rebel* to relax himself ; so that if he relax not within that time, his *Life-rent* will fall from the *Denunciation*.

In Competitions betwixt the *Superiour* or the *Donatar*, and the *Rebel's Creditors*, these Rules are observed in our Divisions : First, as to *single Escheats*, (which must be treated here, for their Contingency with *Life-rent Escheats*, though *single Escheats* fall not to the King as *Superiour*, but as *King*.)

No *legal Diligences* nor *voluntar Rights*, for Payment of any Debt contracted after *Rebellion*, will prejudg the *King* or his *Donatar* ; since otherwise a *Rebel* at the *Horn* might fraudulently contract Debt to evacuate the *Escheat*.

2°. If a *Lawful Creditor* for a *Debt* prior to the *Rebellion*, compleat his diligence before *Declarator*, he will be preferred to the *Donatar*.

3°. No *Voluntar Assignment*, (though for a *Debt* prior to the *Rebellion*) if granted

granted after *Rebellion*, and compleated by Tit. V. intimation before *Declarator*, will be preferred to the *Donatar*; but actual Payment will be preferred, if the Debt was prior to the *Rebellion*, and the Payment obtained before *Declarator*. As to *Life-rent Escheats*, the Rules in Competitions run thus.

*Primo*, Though the Debt was prior to the *Denunciation*, no voluntar Infestment will prejudg the *Superiour*; except the *Rebel* was obliged prior to the *Rebellion*, to grant that Infestment, and that the Infestment it self was expired within Year and Day of the *Denunciation*.

*Secundo*, Though *legal Diligence* be more favourable than *voluntar Rights*, because there is less *Collusion*, yet no *legal Diligence* will be preferred to the *Superiour*, except it was led for a *Debt* prior to the *Denunciation*, and was compleated by Infestment or Charge, or that a Signature was presented to the Exchequer (which in Lands holding of the *King*, is equivalent to a Charge, since the *King* cannot be charged) within Year and Day thereof; albeit the said *legal Diligence* was deduced after the *Denunciation*.

Though

Book II.

Though this be the Course in Competitions, *quoad Life-rent Escheats*; yet actual Payment made to, or Diligences done by Creditors for Payment of Debts, prior to the *Rebellion*, or the commission of Crimes, will be preferred to the *Donatar*; if these *Rights* or *Diligences* be compleated before *Declarator*, which we owe rather to the benignity of our *Kings*, than to the Nature of these Rights, since there is *jus quesitum Fisco*, by the *Denunciation*.

*Life-rent Escheats* is proper to all kinds of Holding, except *Burgage* and *Mortification*; for the *Vassal* being a *Society* or *Incorporation* dies not, and so can have no *Life-rent Escheat*; and albeit the *Administrators* were denounced for *Debts* due by the *Incorporation*, yet that is still presumed to be their *Negligence*, which ought not to prejudice the *Society*.

For compleating this *Casualty*, a general *Declarator* must be raised at the *Superiour* or *Donatar's* instance, to hear and see it found and declared, that the *Vassal* was orderly denounced *Rebel*, and has continued at the *Horn Year* and *Day*: And in Competitions betwixt *Donatars* the last Gift, if first declared, will be preferred.

If

If the Gift be taken to the behove of *Tit. V.*  
the *Rebel*, it is null; and it is presumed to  
be to his behove, if he or his Family be  
suffered to stay in Possession; or if the  
Gift be procured by the *Rebel's means*.

It is observable in *Temporary Casualties*, such as *Ward*, *None-entry*, and in  
all Consolidations of the Property, with  
the *Superiority*, such as *Recognitions*, *Ba-*  
*stardies*, *Ultimus haeres*, the *Fee* returns  
to the *Superiour*, burdened with all *real*  
*Rights*, to which he has consented by  
Confirmation or otherwise: And with all  
these Rights which the Law hath establish-  
ed, without either Paction or Party, or  
consent of *Superiour*, such as *Terce* and  
*Courtesy*; and therefore such Rights do  
in both cases defend against the *Superiour*:  
But when the *Lands* return to the *King*  
by *Forefaulture*, His Majesty is not obliged  
to acknowledg either *Terce* or *Courtesy*,  
or any other Right but what himself hath  
actually confirmed; and both the *King*  
and other *Superiours* have no more Right  
by *Life-rent Escheat* than the *Vassal*  
himself had formerly, since they come  
only in the *Vassal's Place*, who by his  
*Rebellion* is rendered incapable to serve the  
*Superiour*.

When

Book II.



When these *Casualties* are gifted by the *King*, the Writ by which they are transmitted, is called a *Signature*, (as all other Writs are which pass his *Majesty's* Hand) and they are so called because they are *signed* by him : And they must be written by Writers to the *Signet*, and pass the *Signet*.

If these *Signatures* contain only *Temporary Casualties*, such as Gifts of *Ward*, *Marriage*, *Escheat*, &c. or only a Right to *Moveables*, they pass only the *Privy Seal* ; for what Right Subjects transmit by *Assignations*, his *Majesty* transmits by the *Privy Seal* : But if the Right require a *Formal Disposition*, and to be compleated by *Infestment*, it must be transmitted under the *Great Seal*, and the *Signatures* ought to express what *Seals* they should pass. All great *Offices* and *Commissions* to *Judicatures* should likewise pass the *Great Seal* ; except it be otherwise provided by Law, as *Commissions* of *Justiciary*, which by Act of *Parliament* are allowed only to pass the *Quarter Seal*.

This *Quarter Seal* was originally invented for sealing *Writs*, which first passed the *Great Seal*, as Precepts of *seizing* upon *Charters* past the *Great Seal*. And

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is therefore called the *Testimonial* of the *Great Seal*, and the shape of it is the fourth part of the *Great Seal*. The *Great Seal* contains virtually the *Privy Seal*; and therefore, though when a Man is forfeited, the Right of his Moveables should be transmitted by a Right under the *Privy Seal*, and the Right of his Lands under the *Great Seal*; yet the Lords have found that the Right of the Moveables may be transmitted in the same *Signature* with the Lands, if the Moveables be therein expressly disposed and assigned.

These *Seals* were invented to be Checks upon such as obtain'd Gifts from the *King* by *Subreption* or *Obreption*; that is to say, by concealing what is true, or expressing what is false: For even after the *Signature* is pass'd the *King's* Hand, it may be stopt in these Cases.

The last Privilege of the *Superiour* is, that he may force his *Vassal* to exhibit his *Evidents*, to the end he may know what is the nature of the *Holding*, and in what he is liable to him as his *Superiour*, which proceeds ordinarily by an *Action of Improbation*; whereby he will be forced to exhibit, and produce his *Evidents* to shun the hazard of the Certification in the *Improbation*.

TIT.

T I T. VI.

*Of the Right which the Vassal acquires  
by getting the Feu.*

**T**He Vassal by getting the Feu settled in his Person, by Charter and Seisin, as said is, has Right to all Houses, Castles, Towers, (but not Fortilaces) Woods, and other things that are above Ground of the Lands expressly *disponed*; and to Coals, Lime-stone, and other things within Ground, and to whatever has been possessed, as part and pertinent of the Land *past Memory of Man*: But there are some things which pass not under the general *dispositive words*, and require a *special Disposition*, which belongs to the King in an eminent way, and are called therefore *Regalia*, and are not presumed to have been *disponed* by his Majesty or any other *Superiour*; except they were *specially mentioned*; such as are all *Jurisdicktions*, Forrests, Salmon-fishings, Treasures hid within the Ground, and Gold, Silver, and Fine Lead; for other Mines, such as Iron, Copper, &c. belong to the Vassal\*.

Regalia.

\* K. Ja. I.  
Par. I.  
AQ 12.

H



If Lands be erected in a *Barrony* by Tit. VI. the King, then though the Lands lye *discontiguously*, one *Seasin* will serve for them all; because a *Barrony* implies an *Union*.

This erecting them in a *Barrony*, will likewise carry a Right to *Jurisdiccions*, and *Courts*, *Fortilaces*, *Forrests*, hunting of *Deer*, and *Ports*, with their small Customs granted by the King, for upholding these *Ports*, *Milns*, *Salmon-fishings*, &c. because *Barronia est nomen universitatis*, and possession of any part of a *Barrony* is reputed possession of the whole: But *Mines of Gold and Silver*, \* *Treasures*, and *Goods confiscated*, are

\* K. Ja. 1.  
Par. 1.  
Act 12.

The *Heritor* has also Power to set *Tacks*, remove and put in *Tenants*, as a consequence of his Property.

A *Tack* is a *Location* or *Contract*, *Tack*. whereby the use of any thing is set to the *Tacksman* for a certain hire; and in *Our Law* it requires necessarily, that the terms of the *Emry*, and the *Ish*, must be express'd, that is to say, when it should begin and end, and it must bear a particular Duty, else it is null; and if it be a *valid Tack*, that is to say, if *Writ* be *adbibited*, (*verbal Tacks* being only *valid* for

Book II. for one Year) and the thing set, the *Contracters Names, Tack-duty, Ish and Entry*, clearly therein express'd, and clothed with *Possession*, it will defend the poor *Tacksman* against any *Buyer* \*; which was introduced in favours of *Poor Tenants*, for encouraging them to improve the *Land*: but it will not defend against a *Superiour of Ward-Lands*, for the *Ward*, &c. though by *Act of Parliament* the *Superiour* be obliged to continue them in their *Possession* till the next *Term of Whitsunday* †.

\* K. J. 2.  
Par. 6.  
Act 17.

† K. J. 4.  
Par. 3.  
Act 26.

Albeit *Tacks* have not all the *Solemnities* aforesaid; yet they are *valid* against the *Granter* and his *Heirs*.

*Tenants* cannot assign their *Tacks*, except they be *Life-rent Tacks*, or that the *Tack* bear a Power to assign; but they may be comprised or adjudged: and if the *Master* suffer the *Tacksman* to continue after the *Tack* is expired, he will be obliged to pay no more than he payed formerly during the *Tack*; and this is called in *Our Law* the benefit of a *tacite Relocation*, that is to say, both the *Setter* and the *Tacksman*, are presumed to design to continue the *Tack* upon the former terms, till the *Tenant* be warned.

Tacite Relocation.

If

If the *Tack* be granted to *Sub-tenants*, Tit. VI. then the *Tacksman* may set a *Sub-tack*, which will be as valid as the *principal Tack*, if clothed with *Possession*.

*Rentals* are also a kind of *Tacks*, but more favourable and easie, because the *Rentaler* and his *Predecessors* have been *ancient Possessors*, and *kindly Tenants*; and he pays a *Grassume* or *Acknowledgment* at his entry, and yet they last no longer than for a *Year*, if there be no time exprefs'd; and if they be granted to a *Man* and his *Heirs*, they last only to the first *Heir*; for else they behoved for ever to belong to the *Heirs*, and so would want an *Ish*: but no *Tack* is accounted a *Rental* except it be in *Write*, and the *Write* bear the same.

*Rentals* cannot be assigned, except that *Power* be granted in the *Rental*; and if the *Rentaler* assign, he loses his *Rental*; though a *Tacksman* forfeits not his *Right* by assigning it, the *Assignment* being only null.

When the *Years* of the *Tack* expire; or though there be no *Tack*, yet the *Master* cannot summarly remove his *Tenant* or *Possessor*, except from *Life-rented Lands*, and *Houses*, or *Towers* and *Fortilaces*, and *visions Possessors*, whom he can re-

H

move

Book II.



move by a Summons on Six Days ; but in all other Cases he must warn him Forty Days before the *Term* of *Whitsunday*, though the *Term* at which he were to remove by *Paction*, were *Mertinmas* or *Candlemas* ; which warning must be executed, that is to say, *intimated personally to the Tenant*, and upon the *Ground of the Lands*, and at the *Parish Kirk* immediately after *Sermon* ; in both which places, Copies of the Warning are to be left : and if he then refuses, he must be pursued to remove *upon six Days* : and after this Citation, the Master will get against him *violent Profits* ; that is to say, the *double of the avail of the Tenement within Burgh*, and the highest Advantages that the *Heritor* could have got, if the *Tenant* possessed Lands in the Country ; nor will the *Tenant* be allowed to defend against this removing, till he find *Caution* to pay the *violent Profits* \*.

\* Q. Mary  
Par. 6.  
Act 39.

Tacit Hypo-  
potheque.

The Master has likewise a *Tacit Hypo- theque* in the *Fruits of the Ground*, which he lets to his *Tenant*, in so far as concerns a *Year's Duty* ; that is to say, they are *impignorated by the Law* for that *Year's Duty*, and he will be preferred either to a *Creditor* who has done *Diligence*, or to a *Stranger* who has bought them ; though

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III

in a Publick Mercat : And the *Lands* Tit. VII.  
*Lord* within Burgh, has a *tacit Hypotheque* in all the Goods brought into his House by his *Tenant*, which he may retain, ay, and while he be payed of his *Tear's Rent* : which *tacit Hypotheque* the *Superiour* has also for his *Few Duty*.

## T I T. VII.

*Of Transmission of Rights by Confirmation, and of the Difference betwixt Base and Publick Infeudments.*

**T**He *Few* being thus established in the Ways of *Vassal's* Person, the same may be transmitted, either to *universal* or *singular Successours* : The first is properly called *Succession*, which shall be handled in the Third Book. *Transmission of Rights* to *singular Successours*, is *voluntar* by *Disposition* and *Assignment*, or *necessar* by *Apprising* and *Adjudication*, and by *Confiscation*, when they are *forefaulted* for *Crimes*, &c.

If the *Vassal* sells the Land, the *Superiour* is not obliged to receive the *Subvassal* except he pleases, though the *Chatter* bear to him and his *Assigns*; and if

Book II. he receive him, there is in Law a Year's  
 ~~~~~ Rent due to the Superiour, as an acknow-  
 ledgment for changing his Vassal.

Lands are disposed, either to be holden of the Disposer's Superiour, and that Infestment is called a Publick Infestment; because it publick. is presumed it will be publicly known, being holden of the Superiour: and it is likewise called an Infestment à me; because the Disposer gives it to be holden à me, de Superiore meo: and this Infestment is null until it be confirmed \* by the \* K. Ja. 6. Superiour, which is done by a Charter of Par. 5. Confirmation, wherein the Superiour nar- Aft 66. rates the Vassal's Charter, and subjoins thereto his own Confirmation or Ratification of it; and the last Right being first confirmed, is still preferred †.

† Aft fore-  
 said.

Ease in-  
 festment.

Inf. de me.

Sometimes also the Vassal disposes Lands to be holden of himself, and this is called a base Infestment, and has been allowed by Our Law, (contrary to the Principles of the Feudal Law) in favours of Creditors, who getting Right for Payment of their Debts, were unwilling to be at the Expences to get a Confirmation from the Superiour; and this is called an Infestment de me, because the Disposer gives them tenendas de me, & successibus meis.

These

These *base Infeſtments* being clothed Tit. VII.  
with *Poſſeſſion*, are as perfect and *valid*  
as a *Publick Infeſtment*; for *Poſſeſſion* is  
to an *Infeſtment* to be holden of the *Diſ-*  
*poner*, the ſame thing that *Confirmation*  
is to an *Infeſtment* to be holden of the  
*Superiour*: and therefore as in a *Compe-*  
*tition* betwixt two *Infeſtments* of the  
ſame Lands, to be holden of the *Superiour*,  
the firſt *Confirmation* would be preferred,  
it being a general Rule in *Law* that a-  
mongſt Rights of equal Perfection, *Prior*  
*in tempore eſt potior in jure*; ſo if a *base*  
*Infeſtment* be clothed with *Poſſeſſion* be-  
fore the *publick Infeſtment* be confirmed,  
the *base Infeſtment* will be preferred,  
though it was granted after the *publick*  
*Infeſtment*.

For the better understanding of the  
Nature of *base Infeſtments*, it is fit to  
know, that *Poſſeſſion* is in *Law*, *Natural Poſſeſſion*  
or *Civil*; that is *Natural Poſſeſſion*, by *Natural*  
which a Man is *Naturally* and *Corporally* and *Civil*.  
in *Poſſeſſion*, as by labouring of the  
Ground; becauſe ſometimes Men could  
not attain to the *Natural Poſſeſſion* for  
compleating their Rights, therefore the  
*Law* was forced to allow another *Pos-*  
*ſeſſion* by the *Mind* as that was by the  
*Body*, and this is called *Civil Poſſeſſion*;  
H 3 becauſe

Book II. because it is allowed and introduced by the *Civil Law*, of which there are many kinds in *Scotland*: As,

*Primo*, The obtaining *Decrets for Meals and Duties*, and even *Citation* upon an *heritable Right*.

*Secundo*, Payment of *Annual Rent*, by the *Debitor* to the *Creditor*, who has *Infestment of Annual Rent*.


*Tertio*, If a Man be *infest in Lands*, and for *Warrandice* of these Lands be *infest* in other Lands, *Possession of the Principal Lands* is reputed, in the *Construction of Law*, possession of the *Warrandice Lands*.

*Quarto*, If a Woman be *infest* by her Husband in a *Life-rent*, the *Husband's Possession* is accounted the *Wife's Possession*.

*Quinto*, If a Man *dispose* Lands, reserving his own *Life-rent*, the *Life-renter's Possession* is accounted the *Fiar's Possession*, and a *base Infestment* is said to be clothed with *Possession*; if he who is *infest* hath attained either to *Natural* or *Civil Possession*; for the Law cannot punish a Man for not *apprehending Possession*, who could not *apprehend it*: and for the same reason, if the time of *Entry* was not come, he who is *infest* by a *base Infestment*,



*feſiment*, will be preferred in that caſe, Tit. VII. as if he were in Poſſeſſion. And the reaſon of all this is, becauſe Our Law conſidering that *baſe Infeſiments* were *clandestinely* made betwixt *confident* and *conjunct* *Persons*, to the ruin of *lawful Creditors* who could not know the ſame, there being then no *Register of Seſins*; it therefore declared all *baſe Infeſiments* to be ſimulat, which were not clothed with Poſſeſſion: and *therefore before the Term*, at which he who got the *baſe Infeſiment* could enter to the Poſſeſſion, there could be no *Simulation* nor *Fraud* in no Party. And in this the *Law* conſiders much the intereſt of *lawful Creditors*, by ſuſtaining that kind of Poſſeſſion in their *favours*, which would not be ſuſtained in *favours of near Relations*, or where there is no *Onerous Cauſe*: and thus a *baſe Infeſiment* given by a *Father* to his own *Son*, will not be clothed with Poſſeſſion by the reſervation of the *Father's Life-rent*, though the reſervation of the *Father's Life-rent* would clothe a *baſe Infeſiment* granted by him to a *lawful Creditor*; and the *Husband's Poſſeſſion* is accounted the *Wife's Poſſeſſion*, in ſo far as concerns her *principal Jointure*; but not in ſo far as concerns her *additional*

Book II. *Jointure*, in a *Competition* betwixt her  
 and her *Husband's lawful Creditors*.

There is another Possession also called *per Constitutum*, which is, when a Man who gets a Wadset, sets back the Wadset-Lands to the Disponer for payment of a *Tack-duty*, called *The back Tack-duty*: and the Wadsetter receiving payment of that *back Tack-duty*, is said to possess the Wadset-Lands *per Constitutum*.

Sometimes likewise for the more security a *base Infesment*, which is given to be holden of the *Disponer*, will be confirmed by the *Superiour*; but that *Confirmation* does not make it a *publick Infesment*; for no *Infesment* can be called a *publick Infesment*, but that which is to be holden of the *Superiour*: but the use of that *Confirmation* is, that after the *Superiour* has confirmed voluntarily the *Sub-vassal's* Right, he thereby acknowledges his Right; and consequently can seek no *Casualty*, which arises upon want of the *Superiour's* consent, such as *Forfeiture*, or *Recognition*: But because the *Disponer* is still *Vassal*, therefore his *Superiour* will still have right to the *Rents of the Lands*, by his *Liferent Escheat*, and to *Wards*, and *Non-entries* by his Death; but if the *Superiour*

Confirma-  
tion.

\*

riour

*riour* enter the *Sub-vassal* only upon a Charge, (this being no *voluntar act* of his) that does not cut him off from those *Casualties*.

Tit. VII.

Sometimes likewise the *Seller* resigns the Lands in *favours* of the *Superiour*, if the Lands be sold to the *Superiour himself*, which is called *Resignatio ad Remanentiam*; because the Lands are resigned to remain with the *Superiour*: and in that case, the *Property* is said to be *Consolidated* with the *Superiority*; that is to say, the *Superiour* returns to have all the Right both of *Property* and *Superiority*; nor needs he be *infest* of new, because (as we formerly observed) the *Superiour* stands still *infest* as well as the *Vassal*; but the *Instrument of Resignation* must be registered in this Case, as *Seasins* are in other Cases, to put Men in *mala fide* to buy \*.

Resignatio ad remanentiam.

\* K. C. 2. Par. 2. Sess. 1. Act 3.

The other *Resignation* is called *Resignatio in favorem*; which is, when the *Seller* having sold his *Feu* to a third *Party*, resigns the *Feu* in the *Superiour's hands*, for new *Infestment* to be given by the *Superiour* to that third *Party*.

Resignatio in favorem.

The *Warrant* of both these *Resignations* is a *Procuratory* granted by the *Seller* to a *blank Person*, (and this *Warrant* is ordinary

Procuratory of Resignation.

Book II.

Instr. of  
Resig.

ordinarily inserted in the *Disposition*) empowering him to resign the *Feu* in the *Superiour's* hands; and this is called a *Procuratory of Resignation*, and the *Symbols of the Resignation* are a *Staff* and *Baſton*: and accordingly the *Procurator* compears before the *Superiour*, and upon his *Knee*, holding a *Staff* or *Pen* at the one end, which the *Superiour*, or any having Power from him, holds by the other; whereby he resigns the *Feu*, either *ad remanentiam*, or *in favorem*, as said is; whereupon an *Instrument* is taken by the Person in whose favours the *Resignation* is made, which is called the *Instrument of Resignation*; and thereafter the Person in whose favours the *Resignation* is made, (if he be not the *Superiour*) is *infeſt*, and his *Seasiu* must be *registrated* within 60 days, as said is.

The *Resignation* does not perfectly denude the *Seller*, until *Infeſtment* be taken upon it; and therefore the *first Infeſtment* upon a *second Resignation* will be preferred to him, who has but the *second Infeſtment* upon the *first Resignation*: but yet the Lands will be in *None-entry* in the *Superiour's* hand, after the *Resignation* is made, until the Person in whose favours it was made be *infeſt*, for other-

otherways the *Superiour* would want a *Tit. VII.*  
*Vassal*, since he could not call him *Vas-*  
*sal*, from whom he had accepted of a *Resignation*; nor is the Person in whose  
 favours the *Resignation* is made, his  
*Vassal*, since he is not yet *infeft*: but  
 yet the *Buyer* has a *personal Action* a-  
 gainst the *Superiour*, to force him to  
*denude* himself in his favours, since he  
 has accepted the *Resignation*; and he  
 will likewise have an *Action of Dam-*  
*nage* and *Interest* against the *Superiour*,  
 if he accept a *second Resignation*, where-  
 by a *prior Infeftment* may be taken to  
 his *prejudice*; and until *Infeftment* be  
 taken, the *Superiour* gets all his *Casua-*  
*lities*, as *Ward*, *Marriage*, *Life-rent*,  
*Escheat*, &c. not by him in whose  
 favours *Resignation* is made; but by  
 him who *resigns*, since he remains still  
*Vassal* till the other be *infeft quoad* the  
*Superiour's Casualties*.



## T I T. VIII.

*Of redeemable Rights.*

**A**Nother considerable *Division of Heritable Rights* with us, is that some are *Redeemable*, and some *Irredeemable*.


Redeem-  
able  
Rights.

*Redeemable Rights* are these which return to the *Disposer*, upon payment of the *Sum* for which these *Rights* are granted; and are so called, because they may be redeemed by the *Disposer*; and they are either *Wadsets*, *Infestments of Annual Rent*, or *Infestments for Relief*.

Wadset.

A *Wadset*, is a *Right* whereby *Lands* are impignorated or pledged for security of a *special Sum*, which passes by *Infestment* (like other real *Rights*) in the terms of *Alienation* or *Disposition*; and the *Disposer* does secure himself by getting a *Reversion* from the *Buyer*, wherein he grants and declares the *Lands* redeemable from him, upon payment of the *Sum* then delivered, and of the *Annual Rent* thereof, which is *Pactum de retrovendo*; and expresses the place and time when and where it is to be delivered, and in whose hands it is to be consigned; in case the receiver of the *Wadset* refuse to accept

Reversion.

accept his Money. Reversions may be Tit.VIII.  
 either granted by a Paper a-part, or they   
 may be contained in the Body of the  
 Right, and are then said to be *incorporated*  
*in gremio juris*.

These Reversions being against the Nature of Property, and depending upon the meer Agreement of Parties, are to be most strictly observed, and are *strictissimi juris*; so that they are not extended to *Heirs* or *Voluntary Assignees*, except they be *express'd*. But yet they may be apprys'd, which is allowed for the good of Commerce, though a Compriser be in effect an *Judicial Assignee*. Reversions must be fulfilled in the very terms; and it is not enough that they be fulfilled in *equipollent terms*. But after an order of *Redemption* is used; that is, after the Granter of the *Wadset* has *duely premonished the Wadsetter*, and consign'd the Sums due by the *Wadsetter*, it may be assigned; and though the Reversion bears that Premonition be made at the *Parish Church*, it will be sustained if it be made personally to the *Wadsetter*, for that is a *suret certioration*.

Reversions albeit of their own Nature they are *Personal*, binding only the Granter and his *Heirs*, yet they are *real Rights*

Book II. *Rights by our Statutes*, and affect singular

*\* Successours.*

- \* K. Ja. 3.  
Par. 5.  
Act 28. All *Reversions*, (except they be incorporated as said is) and all Bands to make *Reversions*, or *Eikes* to *Reversions*, must be registered within 60 days in the same Register with *Seafins*, for else a *singular Successour* is not obliged to regard them \*; so that if any buy the Land *irredeemably*, and compleat his Right before *Registration* of it, though after *Infestment* upon the *Wadset* he will be preferred; but they are still valid against the *Disposer* and his *Heirs* without *registration*.
- \* K. J. 6.  
Par. 22.  
Act 16. When the Granter of the *Wadset* is to

Order of  
Redemption.

use an *Order of Redemption*, he must premonish the *Wadsetter* to compear, (and take *Instruments* thereupon, called an *Instrument of Premonition*) to receive Payment of the Sums due to him; and at the time and place appointed by the *Reversion*, offer being made of the Money; if the *Wadsetter* refuses voluntarily to renounce, and to accept his Money, it is consigned in the hands of the Person designed in the *Reversion*; or if no Person be designed, it may be consigned in any *responsal Man's hand*: but there must be a *Paper* taken under the *Consignatar's hand*,



## Of redeemable Rights.

III

hand, acknowledging that it was con-  
 signed in his hand; for though an *Instru-*  
*strument* under a *Notar's hand* proves  
 that all this order of *Redemption* was  
 used, yet it will not prove the *Receipt*  
 of a Sum against the *Consignatar*.

Tit.VIII.

If the *Wadsetter* receive his Money,  
 and renounce voluntarily, this is called a  
*voluntar Redemption*: But, because though  
*Renunciations* be sufficient to extinguish a  
*Wadset*, (if no *Infeftment* followed) *Voluntar*  
*Redemp-*  
*tion.*  
 whether the *Wadset* was to be holden of  
 the Granter or Superiour, or to extinguish  
 it, *quoad* the Granter and his Heirs,  
 though *Infeftment* followed; yet if the  
*Wadset* was given to be holden of the  
*Disposer*, the *Wadsetter* must resign *ad*  
*remanentiam*, in the *Disposer's* hands as  
 his Superiour; and thereafter the *Dispo-*  
*ner* needs not to be infeft of new, as no  
*Superiour* needs: but if the *Wadset* be  
 given to be holden of the Superiour,  
 then the *Disposer* uses to take a *Letter of*  
*Regress*, whereby the Superiour obliges  
 him to receive back his Vassal, when he  
 shall redeem his own Lands; for other-  
 ways after the *Wadsetter* is seised, the  
 Superiour is not obliged to receive him  
 back. But the Lands being redeemed,  
 the Superiour may be charged to infeft  
 him,

Letters of  
 Regress.

Book II. him, which is necessary for re-establishing the Right in his Person.

*W* If the *Wadsetter* refuses to renounce after the Order is used, the Lords will force him to renounce, and declare the Lands redeemed, by a Process called a *Declarator of Redemption*; after obtaining of which *Decreet* the Lands are redeemed, and belong to the redeemer, and the *Wadsetter* will upon a *simple Charge of Horning* force the *Consignatar* to deliver him up the Money.

Declarator  
of Re-  
demption.

The User of the *Order of Redemption*, may pass from it at any time before *Declarator*; and therefore the Sums for which the *Wadset* was granted, are still Heritable before *Declarator*; but after that they are moveable, and fall to *Executors*, except the *Declarator* be obtained after the *Wadsetter's Death*, in which case they remain Heritable: And though the *Wadsetter* require his Money, he may pass from his Requisition, either directly by a clear *Declaration* that he passes from it, or indirectly by intromitting with the *Duties of the Wadset-Lands*, or by taking *Annual Rent* for terms subsequent to the requisition.

Wadsets

Proper &

Improper. proper.

*Wadsets* are either *Proper*, or *Im-*

*Proper*

*Proper Wadsets* are these, wherein the *Wadsetter* takes his hazard of the *Rents* of the *Land* for the satisfaction of his *Annual Rent*; and pays himself all *Publick Burdens*. Tit. VIII.

*Improper Wadsets* are these, wherein the *Granter* of the *Wadset* pays the *Publick Burdens*, and the *Receiver* is at no hazard, but has his *Annual Rent* secure. And if a *Wadset* be taken, so that the *Wadsetter* is to have more than his *Annual Rent*; and yet the *Granter* is to pay the *Publick Burdens*, and free him of all hazards: This is accounted *Usury* by *Our Law*; *Usury*. the Punishment whereof is *Confiscation* of *Moveables*, losing of the principal *Sum*, and annulling the *Usurary*, *Contract*, or *Paction*\*: And by a late Statute, *If the Debitor even in a proper Wadset offers Security for the Money, and craves Possession, the Wadsetter must either quit his Possession, or restrict himself to his Annual Rent*†; or if it be an *Improper Wadset*, the *Wadsetter* must impute the *Superplus*, more than pays his *Annual Rent* in sortem. And if a *Man* *impignorat* his *Lands*, or *Bands*, with expreis condition, that if the *Money* be not payed at a precise day, they shall not be thereafter redeemable: The *Law* reprobates this unjust Advantage,

\* K. J. 6.

Par. 14.

Act 222.

Par. 15.

Act 247.

† K. C. 21

Par. 1.

Act 621

Book II. *tage, called Pactum legis commissoria, in pignoribus*; and will allow the Money to be offered at the Bar; or they will allow a short time before extracting of the Decree for Payment of it.

Infestment  
of Rent.

Taking of *Annual Rent* having been discharged by the *Canon Law*, Men did buy *Annual Rents* out of other *Mens Lands*, which was the *Origin of our present Infestments of Annual Rent*, and continues still frequent: by which if Men resolve not to rest on the *Personal Security of the Borrower*, they take him also obliged to infest them in a yearly *Annual Rent*, payable out of his *Lands* correspondent to the *Sum lent*; but if they exceed the *ordinar Annual Rent* allowed by *Law*, it will infer *Usury*; and so they have a *double Security*, one *Personal against the Borrower for Payment*, and another real against the *Ground*, it being *debitum fundi*, for which they may poynd any part of the *Ground*; as also they have good *Action against the Intromitters*, with the *Duties of the Lands* out of which their *Annual Rents* are payable; though they cannot poynd or exact from the *Tenants* any more than they owe to their *Master*\*; if the *Tenants* compear and instruct what they were owing the time they

\* K. J. 3.  
Par. 5.  
A<sup>c</sup> 36.

## Of redeemable Rights.

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they got the *Citation* by producing the Master's Discharges. Tit. VIII.

These *Annual Rents* require a special *Seasin*, like *Wadsets* and other real Rights: the *Symbols* whereof, if the *Annual Rent* be payable in Money, is a *Penny of Money*; but if it be payable in *Viſtual*, it is a parcel of *Viſtual*.

This is singular in *Infeſiments of Annual Rent*, that appryſings thereupon will be preferred to all prior appryſings, quoad the by-gones of the *Annual Rent*, if the *Infeſiment of Annual Rent* was prior to thoſe appryſings, to which the appryſing will be drawn back, and preferred to any intervening Right: which *Privilege* is contained in the late *Act of Parliament*, concerning *Debitor and Creditor* \*.

\* K. C. 2.

These *Infeſiments of Annual Rent*, being properly granted for *Security of Sums*, are extinguished not only by *Resignations*, but by *Renunciations*; and even by *Intromiſſion*, with as much as might pay the principal *Sum*, which *Intromiſſion* is probable by *Witnesses*, whether the *Rent* be *Viſtual* or *Money*: and therefore singular *Successors* buying *Infeſiments of Annual Rent*, are not ſecure by any *Register*, but muſt reſt on the *Warrantice of the Seller*.

Par. 1.  
Act 62.

Book II.

Infestment  
of Relief.

Infestments of Relief are these, which are granted by a Debitor to his Creditor, for security of Sums owing to him, upon which the Creditor cannot enter to Possession till he be distressed; and when the Sum is payed, the Right becomes absolutely null, as being but a temporary Right, and so the Debitor who granted the Right needs not be of new infest, but his former Right revives.

## TIT. IX.

## Of Servitudes.

THE Nature and Constitution of Property and real Rights, being explained in the foregoing Titles, we shall now treat briefly of Servitudes, which are Burdens affecting Property and Rights.

Servitudes  
Real and  
Personal.

Servitudes are either Real, or Personal.

Real Servitudes, are whereby one Man's Property or Ground is affected with some Burden for the use and behoof of another Man's Ground directly and indirectly for the Proprietar's use, as having Right to that Ground, which are divided in Rural Servitudes, and Urban or City Servitudes.

Rural

## Of Servitudes.

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*Rural Servitudes* are *Iter*, which is a Power of going through our Neighbour's Lands; *Actus*, is a Power of driving Carts or Wains; *Via*, is the Privilege of having High-ways in our Neighbour's Ground; and *Aque ductus*, which is a Power and Privilege to draw Water alongst their Ground for watering of our own; and thus *Via* includes *Iter* and *Actus* as the lesser *Servitudes*; so he that has a *Via*, has also Power to drive Carts and Wains, and to walk himself through the Ground burdened with the *Servitude*, and of drawing Stones and Timber through the Ground of the servient Tenement.

Tit. IX.  
Rural Servitudes.  
Actus, Via.

The *City Servitudes*, called *Servitutes Urbane*, are chiefly five.

The first is, *Oneris ferendi*, which is a Privilege, whereby one who has a House in the City, can force the Proprietar who has a House below his, to bear the burden of his House; and he may force the Owner of the servient Tenement to repair it, and make it fit for supporting the dominant Tenement, contrary to the common nature of *Servitudes*.

City Servitudes.  
Oneris ferendi.

*Secundo*, *Tigni immittendi*, which is the privilege of forcing our Neighbour to receive into his House the Trests of ours.

Tigni immittendi.

1 3

Tertio,

Book II.

*Stillicidii.* *Tertio, Stillicidii vel Fluminis*, which is, whereby our Neighbour is obliged to receive the drops which fall from our House, under which is likewise comprehended the Privilege of carrying away our Water by Cinks and Channels.

Non offic.  
Luminibus.

*Quarto, Non officiendi Luminibus*, whereby he can do nothing that can prejudg our Lights.

Altius non  
tollendi.

*Quinto, Altius non tollendi*, whereby our Neighbour cannot raise his House higher, to prejudg the Lights of the dominant Tenement; which he may otherwise freely do if he be not restrained by this Servitude.

By Our Law, *Servitudes* may be constituted without any *Seasin*, because they are *incorporeal Rights*; but though a *Servitude* merely established by *Writ*, be sufficient against the *Granter*, yet they are not *valid* against *singular Successors*; except that Right be clothed with *Possession*, which compleats the *Servitude* and makes it a *real Right*: and they may be likewise established by *Prescription* without any *Writ*, from him who has the *servient Tenement*; though he who is to acquire the *Servitude* by *Prescription*, must have a real Right in his Person of the Lands to which he prescribes the *Servitude*. The



The *ordinary Servitudes* superadded by Tit. IX. us to these of the *Civil Law*, are the *Servitudes* of casting *Fail* and *Divot*, common *Pasturage* and *Multure*s.

*Common Pasturage*, is a *Right of pa-* Common  
sturing the *Goods* and *Cattel* of the do- Pasturage.  
minant *Tenement*, upon the *Ground* of the  
servient, which is constituted frequently  
by a *Charter*, containing the *Clause* of  
common *Pasturage*; and sometimes by a  
personal *Obligement* clothed with *Posses-*  
sion; but albeit it be *indefinite*, yet it  
can reach no further than to the *proportion*  
of *Goods* esseiring to the *Rent* of the do-  
minant *Tenement*, and which they may  
keep and fodder in *Winter*; which is  
done by *Sowming* and *Rowming*, that is Sowming  
to say, the determining the proportion of & Rowm-  
*Goods* belonging to each dominant Tene- ing.  
ment, by assigning them particular *Rowms*  
according to their respective *Rents*.

*Common Pasturage* in our *Law* does Common  
ordinarily comprehend all the *lesser Ser-* Pasturage.  
*vitutes*; such as the casting of *Fail* and  
*Divots* *presumptively* only; for the one  
may be possels'd without the other: nor  
will *common Pasturage* infer a *Servitude*  
of casting off *Fail* and *Divots*, if he who  
possessed the *common Pasturage* was inter-  
rupted as to the casting off *Fail* and *Divot*.

Book II.


 Thirlage.

*Thirlage*, is that *Servitude* whereby the *Lands* of one *Heritor* are to pay some *Duty* to the *Mill* of another.

Mills.

*Mills*, are *inter Regalia*, and require therefore a special *Seisin*; the *Symbols* whereof are *Clap* and *Happer*; but if the *Mill* be in a *Barrony*, *transit cum universitate*.

Multure.

*Mills*, are ordinarily disposed with *Multure* and *Sequels*; the *Multure* are a quantity of *Corn*, payable to the *Heritor* of the *Mill* for *Grinding*. The *Knave-ship*, *Lok* and *Bannock*, are a small quantity payable to the *Servants* for their pains.

 Insucken  
and Out-  
sucken  
Multure.

These quantities that are payed by those that are *thirled*, are called *Insucken Multure*; and those quantities that are payed by such as come voluntarily, are called *Outsucken Multure*.

*Thirlages*, are constituted by *Writ*, or by *Prescription*.

The ways of constituting *Thirlage* by *Writ* are these:

First, When a *Master* *thirles* his own *Tenants* to his own *Mill*; in which case ordinarily he diminishes the *Rent* of his *Land*, in *Contemplation* of what they are to pay to the *Mill* for grinding their *Corns*, which he does by an *Act* of his own *Court*.

*Secundo*,


*Secundo*, When a Heritor sells his Lands to be holden of himself, and *thirles* his *Vassal* to his *Mill*; in which case he sells so much the cheaper, and so the *Multurs* are just.

*Tertio*, When the Heritor of a *Mill* disposes his *Mill*, with the *Multurs* of his own Lands, in which case the *Multurs* are also just; because he gets so much the more for his *Mill*; and so this Servitude is not so odious as it is believed to be.

*Quarto*, If a Man disposes the *Mill* of a *Barrony*, *cum multuris* or *cum astrictis multuris*, in either of these Cases he thereby astricts his whole *Barrony*; though not formerly astricted: but if he disposes the *Mill* of the *Barrony*, *cum multuris solitis & consuetis*; he is thereby understood to have *thirled* only what was formerly *thirled*.

If the *Thirlage* bears *omnia grana crescentia*, all the *Corn* growing upon the Land will be *thirled*, with deduction only of *Seed* and *Horse-corn*, and the *Ferme*, except it be carried to another *Mill*; for it is presumed *Fermes* must be sold.

*Quinto*, When *invecta & illata* are *thirled*, all *Corns* which thole *Fire* and *Water* within the *Astriction*, must pay *Multur*


Book II. *Multur* though they come not to the  Mill; and tholing Fire and Water in this Astriction, is so interpreted as to extend only to *Corns that are steeped and kill'd*.

The way of constituting *Thirlage* by *Prescription*, is *immemorial* or *forty Tears Possession*, by virtue of some *Title*; such as a *Decreet*, though in absence; and even when the *Master* is not called: and any Act of a *Barron Court*, though made only by a *Bailly*, without a special *War-rand* from the *Heritor*, is a sufficient *Title* for *Prescription*: and though the coming to a *Mill* past all *Memory*, does not astrict the *Corners* for the future; it being a general Rule in all *Servitudes*, that, *ea qua sunt mera facultatis non prescribuntur*; yet in *Mills* of the *King's Property*, *immemorial Possession* constitutes a *Thirlage*: and if Men likewise pay *dry Multurs*, that is to say, such a quantity, whether they come to grind or not, for Forty Years, they will be thereby astricted; for it is not presumable they would have payed *dry Multur* for so long a time except they had been *thirled*.

Dry Mul-  
turs.

If the quantity to be payed be not determined in *Writ*, it is regulated by the use of Payment for Forty Years.

Those

Those who are *thirled*, are also obliged Tit. IX.  
to maintain the *Mill, Mill-damms, Water-gangs*, and to bring home its *Mill-stones*. 

If such as are *thirled* bring not their *Corns*, they are persued by an Action called *abstracted Multurs*.

There are two Rules to be observed in all *Servitudes*.

*Primo, Res sua nemini servit*, no Man can have a *Servitude* on what is his own; and therefore if the Land on which we have a *Servitude* become ours, the *Servitude* is *extinguished*.

*Secundo*, When we have a *Servitude* on any other Land, this *Servitude* affects every foot of that Land, *unaquequa gleba servit*; but this is to be taken *civiliter, & non judaice*; so that it must be reasonably used: And thus, if we *fen* out some *Acres*, with Privilege to the *Feuer* to cast *Fail* and *Divot* upon our Moor, for maintaining his Houses; though in strict Law, every part of the Moor is affected with the *Servitude*; yet the *Lords* will allow any Man to Till and Sow his own Moor, leaving such a *proportion*, as may maintain these Houses.

*Personal Servitudes*, are *whereby one Man's Property is affected with some bur-* Personal  
Servi-  
tudes.  
*den*



*den tending directly to the Utility and Profit of another Man : And by the Civil Law are divided in usu fruct, Use and Habitation.*

*Usus fructus, is called Life-rent in Our Law, which is a Right to use and dispose upon any thing during life; the substance thereof being preserved.*

*Use and Habitation were restricted to the naked use of the Life-renter ; whereby his Power of disposing and making Profit of the thing life-rented, was restrained, and are not in use with us.*

Life-rents  
and their  
Division.

*Life-rents are either constituted by Paction, or by Law ; Life-rents by Paction, are either by Reservation, as when a Fiar denudes himself of the Fie in favours of another, reserving his own Life-rent, or by a new Constitution ; as when the Fiar disposes his Lands to another during all the days of his Life ; the first needs no Infestment, but the second does ; else it is not valid against singular Successors : but the Life-renter being infest, transmits his Right to any by Assignment without Infestment : for it being a Servitude and Personal Right, it neither needs nor can admit of a Subaltern Infestment.*

A *Life-renter* also by Reservation, may enter the Heirs of Vassals (though he cannot receive *singular Successors*) if he was himself infeft; but another *Life-renter* cannot; and even a *Life-renter* by reservation cannot enter those Vassals, if he was not once infeft, because he cannot transmit a Right which he has not.


When moe Persons are jointly infeft, they are called *conjunct Fiars*; but though a Wife be a *conjunct Fiar*, yet her *Fie* lasts but during her *life*; and during her *life* she may enter Vassals, and has Right also to all the *Casualties*, as other *Fiars*.

Conjunct  
Fiars.

*Life-rents by Law*, are the *Terce* and the *Courtesy*.

Life-rents  
by Law.

The *Terce* is a *Life-rent* of the *Third* of all the *Tenements*, wherein the *Husband* died infeft, provided by Law to a *Wife*; which is explained before, *Tit. Marriage*: which *Terce* is constituted by an *Inquest*, who upon a *Brief* out of the *Chancery*, directed to the *Sheriff*, or other *Judge* ordinary, do serve her to a *Terce*: upon which Service, the *Judge* to whom the *Brief* was directed without *retouring* it, divides the *Land* betwixt the *Heir* and *Relict*, and expresses the *Marches* in an *Instrument*; and this is called to *kenne* her

Book II. *her to her Terce*; the *Marches* being *ken-*  
 *ned* by the *Instrument*: and though the  
*Service* gives her Right to the third of  
the *Meals* and *Duties*, yet she cannot re-  
move *Tenants* thereby, till she be *kenned*  
to her *Terce*, or the same otherwise di-  
vided; because before division, she brui-  
eth the *Terce pro indiviso*, with the Pro-  
prietar.

Briefes. This *Brieve* contains two Points; First,  
that the *Bearer* was *Lawful Wife* to the  
defunct; And *Secundo*, that he died *infeft*  
in such *Tenements*: but if the *Relict* was  
holden and reputed *lawful Wife* in her  
*Husband's* life, no exception in the con-  
trary will stop the *Service* \*.

\* R. Ja. 4.

Par. 6.

Act 77.

There is no *Terce* in *Burgage Lands*,  
*Few Duties*, or other *Casualties* of the  
Superiority, nor in *Reversions*, *Tacks* nor  
*Patronages*.

Courtesie.

The *Courtesie* is a *Life-rent* granted by  
*Law* to him who married an *Heretrix*,  
of all her *Heritage*, and of that only:  
needs neither *Seasin*, nor other *solemnity*  
to its *Constitution*; but is *ipso jure*, con-  
tinued to him; if there were *Children*  
*procreated* of the *Marriage*, who were  
heard to cry, though the *Marriage* dis-  
solve within *Tear* and *Day*.

All



All these *Life-renters* are obliged to find *Cautio* to preserve the thing *life-rented*, and to leave it in as good condition as they found it, which is called *cautio usufructuaria*; and they are also bound to *aliment* the *appeard Heir* if he have not *Aliundi*, to *Aliment* himself \*.

Tit. IX.

Cautio usufructuaria.

\* K. Ja. 4.

Par. 3.

Act 25.

The Legal terms of all *Life-rents*, are *Whitesunday* and *Martinmas*: And therefore if a *Life-renter* survive *Whitesunday*, or die upon the *Whitesunday* in the Afternoon, her *Executors* have Right to the half of the *Life-rent* Duties for that Year, whether they be payable in *Vitual* or *Monies*: And if she survive *Martinmas*, or die upon *Martinmas-Day* in the Afternoon, her *Executors* have Right to the *Life-rent* Duties of that whole Year, and that whether it be *Land-rent*, or the *Rent of a Mill*, albeit the *Conventional terms* were after *Martinmas*: But if *Life-renters* labour the Lands themselves, their *Executors* will have Right to the whole Rent thereof, at whatever time their death happen.

TIT.



## T I T. X.

## Of Teynds.

Teynds.


**T**EYNDs, being a *Burden affecting Lands*, fall in to be considered in this place.

Teynds are defined to be that *special and liquid Proportion or Quota of our Goods and Rents lawfully acquired, that is due to GOD, for maintaining his Service.*

It seems *Our Law* has followed the opinion of those *Divines*, who think that some *Proportion* of our Goods is due by *Divine Right*; for we say, that *Teynds are the Spirituality of the Churches Revenue*; but that the *Proportion* is not *Juris Divini*, for we alter the *Proportion* by special *Laws and Customs*; though for distinction's sake we call this *Proportion* the *Tenth*.

By the *Canon Law* they are divided  
 \* Personal into \* *personal Teynds*, which arise out  
 Teynds. of the *personal Gain and Profits* that a  
 Man has by his *Trade or personal Industry*:  
 † Predial † *Predial Teynds*, which arise from  
 Teynds. the *Natural Product of the Land* that  
 Men possess. And *mix'd Teynds* which  
 arise

arise from the Profits that Men by their personal Industry make out of their Lands. Tit. X.

They are likewise divided into *Parsonage Teynds*, which are due to the *Parson*; and *Vicarage Teynds*, which are due to the *Vicars*: and regularly all *Teynds* are due to the *Incumbent*, who serves the *Cure*; so that if the *Incumbent* be a *Parson*, he has a Right to the *Parsonage Teynds*; and if he be a *Vicar*, he has Right to the *Vicarage Teynds*.  *Parsonage and Vicarage Teynds.*

The *Teynds* of *Corn* are called *Parsonage Teynds*, or *decime garbales*; and the fifth *Boll* of the *Free-rent* is still *Teynd* with us: And all *Lands* must pay *Teynd*, except they be such as have been *fined* out of old by *Churchmen* before the *Lateran Council*, (by which they were prohibited to *alienate* the *Teynds*) and who had right both to *Stock* and *Teynd*; and where the *Teynds* were never known to have been separated from the *Stock*.

Some *Monks* likewise got particular *Exemptions* from paying *Teynds* for these *Lands* which they themselves did bring in and *cultivate*; and with us the *Privilege* granted to *Temple-Lands*, which belonged of old to the *Knights of St. John*, a *Religious Order*, and to the *Monks* of the *Cistercian Order*, are continued to

K

those

Book II. those who have Right to their Lands, with that *Exemption: Manses, and Gleibs*, are likewise free from payment of *Teynds*.

*Vicarage Teynds*, are called the *small Teynds* with us; because they are payable out of inconsiderable things, such as *Lambs, Wool, Cheese, Eggs, &c.* and they are said to be *local*, because they are payed according to the Custom of the Place; so that in the same *Parishes*, some *Heritors* will be liable for *Vicarage Teynds* of different kinds: for though no Man can prescribe a *liberty* from payment of *Parsonage Teynds* since the *Lateran Council*; yet, as *forty Years Possession* is a sufficient Right to a *Minister* for *Vicarage Teynds*; and as it does determine the *Quota*, as well as the *Species of Vicarage Teynds*; so by *forty Years freedom*, the *Heritor* is secure in all time coming from payment of *Vicarage Teynds*.

When *Popery* was suppress'd, all the Lands belonging to *Monks* and others, were annexed to the *Crown*, in *An. 1587* \*; but the *Teynds* belonging to them, were not annexed; these being acknowledged by our Law to be the *Patrimony of the Church*; and they are therefore called, the *Spirituality of the Benefices*.

\* K. Ja. 6.  
Par. 11.  
Act 29.

The

The *Monasteries* of old having gotten *Tit. X.*  
several *Parish Churches* mortified to them, whereby they had Right to their *Parsonage Teynds*; such as got those *Monasteries* erected in their favours, became thereby to have Right to other *Mens Teynds*: And great Emulation as well as Prejudice arising from *Mens* not having Right to lead their own *Teynds*;

King *Charles* the First, did therefore prevail with all the saids *Titulars of Erection*, to submit what should be payed them, as the price of the saids *Teynds*; and His Majesty did determine, That the rate of all *Teynds* should be the fifth part of the constant *Rent*, where the *Stock* and *Teynd* were accustomed to be set jointly; but where the *Teynds* were set separately from the *Stock*, the *Heritor* did in the Valuation get down a fifth part of what was proven and valued to be the rate of the *Teynds*; and which Deduction is called the *King's Ease*; because it was given by him in his Decreet Arbitral. It was also ordained, That the saids *Teynds* being valued, should be bought at Nine Years purchase\*.

For effectuating this *Determination*, the *Parliament* 1633, appointed some of their own number, to value the saids  
K 2 *Teynds*;

\* K. C. 1:  
Par. 1.  
Act 17,  
and 19.  
K. C. 2:  
Par. 1.  
Sess. 1.  
Act 61:

Book II. *Teynds*; and after a *Process for Valuation* is raised before these Commissioners, in which the Titular his *Tacksman*, and the *Minister* are to be cited, the *Heritor* in the mean time gets the leading of his own *Teynds*.

The *Probation* is oft-times allow'd to both *Parties* in this Court; and where one *Party* is preferred, it is called, the *Prerogative of Probation*; and is much contended for, and is thus regulated, viz. either the *Teynds* are drawn *ipsa corpora*, by the *Titular*, or *Tacksman*; and then they have the *sole Probation* allowed them, to prove what the *Teynds* were worth, (they proving that they led *seven Tears* of *fifteen* before 1628.) or else they have *Rental Bolls* payed them; & *eo casu*, they have the *sole Probation* likeways, they proving *twenty Tears* Possession of uplifting *Rental Bolls*, condescending upon quantity and quality: Or *Tertio*, the *Hèritors* have *Tacks* of their own *Teynds* for payment of *Silver Duty*; and then there is *joint Probation* allowed both to *Heritor* and *Titular*.

*Ecclesiastick Persons*, such as *Bishops*, *Parsons*, &c. submitted only what they were not in Possession of; and therefore there can be no *Valuation* led of any *Teynds*,

Teynds, Parsonage or Vicarage, which Tit. X. they were actually in Possession of: but by a Letter from His Majesty thereafter, in Anno 1634, it is declared, That if their Teynds be set to Tacksman, they may be valued during the Tack; whereas the Teynds they were in the natural Possession of cannot; though Teynds holden of Collegiat Kirks may be valued, and so may be bought and sold.

The Burroughs are only decerned to sell the Superplus of the Teynds they had Right to, over and above what will be due for the entertainment of their Ministers, Colleges, Schools and Hospitals.

After the Teynds are valued, and the Titular decerned to sell; or if the Titular be willing to sell without a Decreet, the Heritor is infest, and seased by the Titular, who in the Disposition or Charter reserves to himself relief of the King's Annuity, and of all Impositions laid or to be laid upon Teynds; and Warrants only from his own, and his Predecessor's Facts and Deeds; and on the other hand, the Heritor who has got a Decreet of Valuation only, and not of Vendition, is obliged to infest the Titular, for Security of the valued Bolls.

Book II.

~~~~~  
 Burdens  
 affecting  
 Teynds.

By the foresaid *Decreet Arbitral*, the several *Parish Kirks* were to be provided; and therefore the *Titular* might *Allocat* any one *Heritor's Teynds* for Provision of the *Minister*, which renders the Privilege of buying very ineffectual to the *Heritors*; whereas it had been much better that the *Stipend* had been proportionably laid upon all the *Heritors*.

*Teynds* are not *debita fundi*, and so *singular Successors* are not liable in them; but yet the *Minister* has so far a *tacit Hypotheque*, that he may exact his *modified Stipend* from any of the *Heritors*, as far as his *Teynds* will extend, reserving *relief* to that distressed *Heritor*; and if the *Heritor* sell his *Crop*, the *Merchant* who buys the same will be liable; but *Tenants* will not be liable, if they pay a *joint duty* to their *Master* both for *Stock* and *Teynd*.

inhibi-  
 tion upon  
 Teynds.

When the *Tack of Teynds* expire, the *Titular* needs not use a *warning* against the *Tacksman*, as in *Lands*; but he raises and executes an *Inhibition* against the *Tacksman*, which interrupts *tacit Relocation* for that and all the *subsequent Tears*, after which the *Intromettors* are liable to a *Spuilye*.

The



The Parliament 1633, did after the Tit. XI. said Submissions and Decreet Arbitral, grant to His Majesty an Annuity out of all Teynds, except those payed to Bishops and other Pious Uses; viz. ten shilling out of every boll of teynd Wheat; out of the boll of the best teynd Bear, eight shilling; out of Oats, Pease, and Rye, six shilling, where the boll of these Grains did yield a boll of Meal; and where the Rent consists of Money, six merks out of every hundred: and this Annuity is debitum fundi; but not being annex'd to the Crown, it may be, and is ordinarily bought by the Heritors from His Majesty's Theasaurer, or others having Right from the King.

## T I T. XI.

## Of Inhibitions.

Property and Real Rights, with the Burdens affecting the same, being explained; it is fit now to treat of Legal Diligences, by which these Rights may be evicted, or the free use and disposal thereof restrained; which Diligences are chiefly three, Inhibition, Comproysing, and Adjudication.

Book II.


  
 Inhibition.
Ground  
thereof.Extent  
thereof.

*Inhibition*, is a personal Prohibition by Letters under the Signet, discharging the Party inhibited to sell, dilapidate, or put away any of his Lands, in prejudice of the Debt due to the Raifer of the Inhibition. The Ground and Warrant thereof is a Decree, or a Registrate Bond, (which in the Construction of Law is a Decree) either decerning or obliging the Debtor to pay or perform the Sums or Deeds therein specified; or a depending Process: And if these Inhibitions be not raised upon Legal and Relevant Grounds, they may be reduced.

*Inhibitions* reach only *Heritage*, but not *Moveables*; though the stile thereof runs equally against both; and *moveable Bands* can only be reduced; in so far as they may be the Foundation of *real Diligences* to affect *Heritage*, reserving still personal Execution against the Granter; and they extend only to *posterior voluntary Rights granted after Inhibition*, but not to *Apprysings*, or *Adjudications*, though led posterior to the *Inhibition*, if the ground thereof was *Anterior*: neither do they extend to *posterior Dispositions* and *Infestments* depending upon *prior Obligements*, either general or particular, for granting of these Rights; nor  
to

to *Renunciations of Temporal Rights*, albeit posterior to the *Inhibition*, these being necessar upon Payment. *Tit. XI.*

By a late Act of *Sederunt* \*, If the \* Act of  
*Creditor intimate by way of Instrument, to* *Sed. 19.*  
*the Person having the Right of Reversion,* *Feb. 1680.*  
*that the Wadsetter or Annual-renter stands*  
*inhibit at his instance, and does produce*  
*in presence of the Parties and Notar, the*  
*Inhibition duly registrated; The Lords*  
*will not sustain Renunciations, or Grants*  
*of Redemption, although upon true Pay-*  
*ment, unless there be a Declarator of Re-*  
*demption obtained, to which the Inhibiter*  
*must be cited.*

The way of *executing Inhibitions* is, *Manner of*  
 that the same must be by a *Messenger* *executing*  
 against the Person *inhibited, personally or* *Inhibi-*  
 at his *Dwelling-place*, and at the *Mercat-* *tions.*  
*Cross of the Head Burgh of the Shire,*  
*Stewartry, or Regalities where the Per-*  
*son inhibited dwells* \*: and after *Crying* \* *K. J. 6.*  
*of three several O yes's, and publick read-* *Par. 15.*  
*ing of the Letters, the whole Leiges are* *Act. 264,*  
*discharged to purchase any Lands or He-* *and 265.*  
*ritages, from the Person inhibited; and* *Par. 16.*  
*the Messenger leaves or affixes a Copy of* *Act 13,*  
*the Letters at the Mercat-Cross, all which*  
*must be written in a Paper, and subscri-*  
*bed by the Messenger and by two Wit-*  
*nesses;*

Book II. *nesses* \* ; which Writ is called the *Execution of Inhibition* : and thereafter the *Letters and Execution thereof must be registered* within forty days after the *Execution* thereof ; either in the *general Register at Edinburgh*, or in the *particular Register of the Jurisdiction*, where the *Person inhibited dwells*, or the *major part of the Lands lye* \* : and if any of these *Acts be omitted*, the *Inhibition is null* ; these being *de solennitatibus instrumenti*.

\* K. C. 2.  
Par. 3.  
Act 26.

\* K. J. 6.  
Par. 7.  
Act 119.

## T I T. XII.

*Of Compyrings and Adjudications.*

**T**He *Fie* being thus settled in the *Vassal*, it may be either taken from him, and evicted for his *Debt* or his *Crimes* ; the first is by *Apprysing* and *Adjudication*, and the last by *Confiscation* and *Forefaulture*.

*Apprysing* proceeds by *Letters* charging the *Debitor* to compare before a *Messenger*, (who is by the *Letters* made *Judge*, and *Sheriff* in that part, in Place of the *Sheriff of the Shire*, whose Office properly it is \*) and to hear the *Lands specified in the Letters*, apprised by an *Inquest*

\* K. Ja. 6.  
Par. 5.  
Act 37.

*quest of fifteen sworn Men*, and declared *Tit. XII.*  
to belong to the *Creditor for Payment of his Debt.* But because *Our Law* thought it not just that a Man's Lands should be taken from him whilst his *Moveables* could pay his Debt; therefore, in the first place the *Messenger* who executes the Letters, must declare that he *searched for Moveables*; and because he could not find as many as *would pay the Debt*, therefore he denounced the Lands to be apprised on the *Ground of the Lands*, and at the *Mercat-Cross* of the *Shire, Stewartry, or Regality* where the *Lands lye*, and left *Copies both on the Ground*, and at the *Cross*.

At the day appointed by the *Letters*, the *Messenger* who is made *Sheriff* in that part, *Fences a Court*, and the *Debitor* being called, his Lands are offered to him for the *Money*; and if the *Money* be not ready, the *Inquest* finds that the *Debitor's Lands* should belong to the *Creditor for his Payment*, and this is called a *Decreet of Comprysing*; and the most part of the *Inquest* affixes their *Seals thereto*; upon which the *Compryser* gets a *Charter* pass'd in *Exchequer*, and is *infeft by Precepts out of the Chancellary*, if the *Lands hold of the King*: and though

Decreet of  
Compry-  
sing.

†

of

Book II.



of old, *Land apprysed* was proportioned to the *Money*; yet thereafter whatever *Land* was sought to be *apprysed* was accordingly *apprysed*, though *far exceeding* the *Sum in value*; because *seven Years* was given (which was thereafter *prorogated to ten \**) for *Redeeming the Land* by *Payment of the true Sum*: and this is called a † *Legal Reversion*, because the *Law* gives it to the *Debitor*; and if it be not *redeemed* within that time, the *Land* belongs to *himself for ever*: but that *legal* runs not against *Minors*, because they want *Judgment* to know their *bazard*; so that they may *redeem* at any time before they be *twenty five Years compleat*: but if the *Compyssing* expire during their *Minority*, the *Compysser* will thereafter have *Right* to the whole *Meals* and *Duties*, albeit exceeding his *Annual Rent*: But that part of the *Act* is altered by a *posterior Statute*, and the *Appryser* is restricted to his *Annual Rent* during the *Minority of the Debitor \**.

\* K. C. 2.

Par. 1.

Sess. 1.

Act 62.

† Legal

Reversion.

\* K. C. 2.

Par. 1.


Sess. 3.

Act 10.

If a *Minor* succeed to a *Minor* whose *Lands* are *apprysed*, he has *Right* to *redeem*, as if the *Compyssing* had been led against himself: But if a *Major* succeed to a *Minor* after the *Legal* is expired, he hath only *Year and Day* to *redeem*; and

H

if

if the seven Years be unexpired in the *Tit. XII.*  
*Minor's* time, the *Major* may redeem   
 within these Years that are not run :  
 And if the Rent of the Lands be not cor-  
 respondent to the *Annual Rent of the*  
*Money* ; whoever has Right to the Re-  
 version, whether *Major* or *Minor*, must  
 satisfy the whole Sums and *Annual Rents*  
 resting before he can \* redeem : But the \* K. J. 6.  
*Compriser* during the *Legal*, is restricted Par. 23.  
 to the *Annual Rent* of the Sums due to Act 6.  
 him, and the *superplus of his Intromis-*  
*sion*, will be imputed in Payment of his  
*principal Sum* ; and if he be payed by *In-*  
*troumission*, within the *Legal* of his whole  
*principal Sum*, by-gone *Annual Rents* and  
*Expences*, with the *Composition* payed to  
 the *Superiour*, the *Comprising* expires  
*ipso facto* \*.

Though the *Superiour* be not regularly Par. 21.)  
 obliged to receive a *singular Successour*, Act 6.  
 yet left by *Collusion* betwixt the *Debitor*  
 and his *Superiour*, the true *Creditor* should  
 be unpaid ; therefore by a special Act \* K. Ja. 5.  
 of *Parliament*, the *Superiour* is forced to Par. 5.  
 receive a *Compriser* upon Payment of a full Act 37.  
 Year's Duty of the Land \*, and he gets no K. J. 6.  
 more from all, though many *Compry-* Par. 23.  
*sers* charge him to receive them ; but Act 6.  
 if the *Superiour* pleases, he may retain  
 the

Book II. the Land to himself, he paying the  
 Debt.

The first *Comprising* without *Seasin*, carries Right to all *Tacks*, *Reversions*, and other Rights which require no *Infeftment*; and all *posteriour Comprisings* need not *Infeftment*, because they carry only the Right of *Reversion*; but yet ordinarily *second Apprisers* do *infeft* themselves, because the first may be *null*, or become payed; or the first *Compriser* may lye out from seeking *Meals* and *Duties*; or the second *Comprisers* would remove *Tenants*, which none can pursue without being *infeft*; but the *Superiour Comprising* needs no *Infeftment*.

After *Denunciation* of the Lands to be *apprised*, the *Debitor* can do no voluntar Deed by disposing or resigning, (because else he might frustrate the *diligence*) except he was before *Denunciation* specially obliged to *Dispone* or *Resign*.

Preference  
amongst  
Apprisers.

In a Competition amongst *Apprisers*, the first *Infeftment* or Charge against the *Superiour* is always preferred; and if the first *Compriser* did diligence to be *infeft*, but was stoppt by *Collusion*, as if the *Superiour* to gratify the second *Compriser*, should unjustly suspend the first, albeit the  
 the



the second *Appriser* be first *infest*, yet the *Tit. XII.*  
 first *Appriser* having done *diligence*, by  
 charging the *Superiour*, will be preferred  
 to the second *Appriser* first *infest*.

The *Compriser* during the *Years of the*  
*Legal*, is not obliged to enter to the *Pos-*  
*session*; but if he once enter, he must be  
 comptable for the *Meals* and *Duties*,  
 though he leave off to *possess*; but if the  
 meanest part of the Sum be unpaid after  
 the expiring of the *Legal*, the whole  
*Land comprised* belongs to the *Compriser*,  
 without consideration of what he has *in-*  
*tromitted* with; to prevent which, the  
*Debitor*, or a *Second*, or any *posterior Com-*  
*priser*, who has *comprised* the Right of  
*Reversion*, does before the *Legal* expire,  
 require the *Compriser* to compear at any  
*Day* or *Place* to receive his *Money*, in so  
 far as he is not payed by his *Intromission*;  
 and having *consigned* the same accordingly  
 at that Day, he raises an *Action of Compt*  
 and *Reckoning* before the *Lords of Session*;  
 and if it be found that he is payed by *In-*  
*tromission*, and the *Money consigned*, the  
*Lords decern the Comprising to be payed*  
*and extinct*: nor needs the *Debitor* get  
*new Seasin*, for the former Right revives;  
 since the *Fie* was still in his Person, upon  
 condition that he would *pay the Sum* with-  
 in the *Legal*. In

Book II.

Sherriff  
Fie.

In this *Compt* and *Reckoning*, the *Compriser* will get allowance of the *Sheriff* *Fie*; which is the *twenty Penny* of the *Sum* that was *comprised* for, and of the *entry* payable to the *Superiour*, though the *Appriser* truly payed neither; but he will not get Payment of a *Factor's Fie* for taking up the *Rent*, except he really payed it.

K. C. 2.  
Par. 1.  
Act 62.

All *Apprisings* led since the First of *January* 1652, within *Year* and *Day* of the first *effectual Comprising* by *Infestment*, or charge against the *Superiour*, come in *pursu*, as if they were all contained in one *Apprising*. But the *posterior Apprisings* within *Year* and *Day*, must pay their *Proportion* of the *Expences* of the *Infestment*, and *Composition* given to the *Superiour* by the first *Appriser*.

Act fore-  
said.

Because *appear and Heirs* did frequently acquire Rights to expired *Apprisings* against their *Predecessors*, by which they *brinked their Estates* without paying their Debt, to the ruin of *lawful Creditors*: Therefore *Our Law* did very justly ordain all such *Apprisings* to be redeemed for the *Sums* truly payed out by the *appear and Heir*; which proceeds, albeit the *Appear and Heir* acquire these Rights in his *Prede-*

*Predecessor's life-time.* But if the ex- Tit. XII.  
pired *Apprising* was acquired *gratis* by the  
*appairand Heir*, the same is only redeema-  
ble by the *Creditors* for the Sums con-  
tained in the *Apprising*.

Because the *Parliament* thought it ex-  
orbitant to take the greatest *Estates* for the  
smallest Sums, and to make a *Messenger*  
*Judg* in Affairs of so great *Importance*;  
therefore in *Anno 1672.* this way of  
*Comprising* was altered, and in place there-  
of the *Creditor* now gets Land adjudged  
to him by the *Lords of the Session*, pro-  
portionally to the Sums due to him (with  
a fifth part more) besides the Composition  
due to the Superiour, and Expences for  
obtaining *Inseftment*, because the *Credi-*  
*tor* is obliged to take Land for his *Money*;  
which *Adjudication* coming in place of  
*Comprisings*, is perfected by *Charter* and  
*Seasin*, as *Comprisings*; and the *Superiour*  
is obliged to receive the *Adjudger*\*, but  
it is redeemable only within *five Years* by  
*Majors*.

Adjudica-  
tion.

\* K. C. 2.  
Par. 2.  
Sess. 1.  
Act 18:

If the *Debitor* compear not to concur  
for compleating the *Adjudger's Right*, by  
giving him a *Progreß*, and *transumps* of  
the *Evidents*, and ratifying the *Decreet of*  
*Adjudication*; then the whole Lands must  
be *adjudged*, as they were formerly *appri-*  
L. sed;

Book II. *sed*, (nor in that case can the Adjudication contain a fifth part more) it being unreasonable to *force* a Man to take *proportional Land* for his *Money*, and yet to be unsecured even for that *Proportion*; and they are *redeemable* within *ten Years*, (these *Adjudications* being now come in the place of *Apprysings*) and have the same *Privileges* and *Restrictions* which *Comprisings* had by the *Act of Parliament*, made concerning *Debitor* and *Creditor*, in *Anno 1661*. But if the *Creditor* attain Possession upon his *Comprising*, or *Adjudication*, he can use no farther *execution* against the *Debitor*, except the Lands be *evicted* \*.

\* R. C. 2.  
Par. 2.  
Sess. 3.  
Act 19.

There are other two kinds of *Adjudication* †, allowed by *Our Law*; The first is, when the *appearand Heir of the Debitor is charged to enter Heir*; and renounces to be *Heir*; the *Creditor* having obtained a Decreet, *cognitionis causa*, for constituting the Debt, wherein the *appearand Heir* is only pursued for *Formality*: But the Decreet can have no effect *personally* against him; in which case, the *Hereditas jacens* will be *adjudged* to the *Creditor* for Payment of the Debt due by the *Defunct*; which if it be *liquid*, and instantly instructed, the *Pursuer* in the same Process prote-

† Adjudications after the old Form.

## and Adjudications.

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protesting for *Adjudication*, the same will be allowed to him, summarily without necessity of any other Decreet; *cognitionis causa*. Tit. XII.

These *Adjudications* are redeemable within *seven Years*, at the instance of *Con-creditors* one after another, who have likewise obtained Decreets of *Adjudication*: And a *Minor* renouncing to be *Heir*, may be reponed, and allowed to *redeem upon Payment* \*. But *Majors* renouncing have not that Privilege directly, it being only by Act of Parliament granted to *Minors* or to *Con-creditors*, likewise *Adjudgers*. Legal Re-  
ver. of  
Adju.

And if the *Superiour* be charged to infest the *Adjudger*, he will get a Year's Rent for *Composition*, as in *Comprisings* \*.

*Adjudications* carry right to all which would have fallen to the *Heir*, as all heritable Rights; and the whole by-gone Rents and Duties, since the Defunct's death, may be *adjudged*, because these belonged to the *Heir*.

There is another kind of *Adjudication* competent by Our Law; that is for performing any obligation which consists *in fact*, and relates to particular *Dispositions*, and *Obligements* to *infest*: and after

L 2

*dili-*

\* K. C. 2.  
Par. 1.  
Sess. 1.  
Act 62.

\* K. C. 2.  
Par. 2.  
Sess. 1.  
Act 18.

Book II. *diligence* used by Decreet, and registered  
 ~~~~~ *Horning* against the Disponer and his  
 Heir, and for making the same effectual,  
 the Lords will *adjudge* the *Lands* disposed  
 to belong to the Pursuer as a *Remedium*  
*extraordinarium*, there being no other  
 Remedy competent.

This *Adjudication* extends no further  
 than to the thing disposed, and hath no  
*Reversion*.

If the common *Debitor* become *Bank-*  
*rupt*, and that there are real Diligences  
 affecting his Estate, then the Creditors  
 may raise an *Action of Sale* before the  
 \* K. C. 2. *Lords*, and get the Estate roup'd \*, and  
 Par. 3. divided amongst them, effecting to their  
 Act 17. Diligences and Sums.

In this Process, the Lords first deter-  
 mine what shall be the lowest Price, and  
 then they name one of their Number be-  
 fore whom the *Roup* is to be made ; and  
 if none offer more, the Raiser of the  
 Action is preferred, and the *Lands* are  
 disposed by that *Lord*, and the disposi-  
 tion runs in his Name.

Confisca-  
 tion.

*Confiscation* will be handled in the *Ti-*  
*tle of Crimes*.

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THE  
INSTITUTIONS  
Of the LAW of  
SCOTLAND.

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BOOK III.

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TITLE I.

*Of Obligations and Contracts in general.*

**H**AVING thus cleared *Real Rights*, we will now proceed to treat of *Obligations*, and *Personal Rights*.

An *Obligation* is defined to be that legal *Obligation* whereby we are bound to pay or perform any thing.

The chief division of *Obligations* by the Division of *Civil Law* and *Ours*, is, that some are of *Obligations*.

L 3

Natural,

Book III. *Natural*, because they arise from the Principles of *right Reason*, or *Laws of Nature*. Some *Civil*, because they arise from *Positive Laws*, or *Municipal Customs*.

Another  
Division of  
Oblig.

Another considerable division of *Obligations* is, that some arise from *Contracts*, some from *Deeds* resembling *Contracts*, some from *Malefices*, and some from *Deeds* which resemble *Malefices*; *Ex contractu, aut quasi contractu; ex maleficio, aut quasi maleficio*: for we become equally tied and obliged to *Men*, either by *contracting expressly* with them, or by doing some *Deed* which induces an *Obligation* without an *express Paction*; or by committing *Malefices* against them.

Contracts.

A *Contract* is an *Agreement* entered into by several *Persons*, inducing an *Obligation* by its own *Nature*; and the *Obligations* arising from *Contracts* are divided and distinguished according as they are perfected, either by the *sole consent* of the *Contractors*, or by the *Intervention* or *Tradition* of things; or lastly, by *Word* or *Writ*: hence is that remarkable division of *Contracts* in the *Civil Law*, *Qui re, verbis, literis, aut consensu perficiuntur*.

Real Con-  
tracts.

The *Contracts* which depend upon things are these, which arise either from  
*Borrowing,*



## Contracts in general.

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*Borrowing*, (which comprehends *indebiti Tit. I. solutum*) or from *Loan*, or from *Deposition*, or from *Impignoration*; and are called *mutuum, commodatum, depositum & pignus*.

*Borrowing, or Mutuum, is that Contract*, whereby a Man getting any thing from another, is obliged to restore him not the same thing that was borrowed, but the equivalent; or as much of the same quality in measure, number, and weight: as when one borrows a *Thousand Pounds*, the Receiver obliges himself to restore not the same, but another *Thousand Pounds*; and therefore the *Property of the thing borrowed*, being transferred from the *Giver* to the *Receiver*, the *Receiver* runs the hazard of all the loss that the thing borrowed can sustain after it is delivered: This Contract is most strictly interpreted, so that nothing is understood but what is clearly express'd.

*Loan, or Commodatum, is that Contract* whereby a Man gets the *Loan of any particular thing gratis, for some special use, and obliges him to restore the same thing in specie, and not the equivalent*; as when a Man gets the *Loan of a Horse, or Coach*: and because in this case the *Property* remains with the *Lender*, there-

L 4

fore

Book III. fore if the thing lent be lost, or perish by  
 ~~~~~ Chance, the loss redounds to the *Lender*;  
 for the thing is still his: but if the thing  
 be lent merely for the advantage of the  
*Borrower*, he is liable to do most exact  
 diligence; and therefore, if the thing  
 perish, or sustain any prejudice for want  
 of exact diligence, the *Borrower* must  
 make up the same; but if the thing was  
 lent for both the *Borrower* and the *Len-*  
*der's Advantage*, then from the same  
 principle of *natural Equity*, the *Borrower*  
 is only obliged to do such diligence, and  
 to be so careful of the thing *borrowed* as  
 he would have been of his own.

In this *Contract*, the *Receiver* is obli-  
 ged to restore the same *Species* in as good  
 condition as he got it; and the *Lender* is  
 obliged to pay the *Receiver* any considera-  
 ble *Expences*, that he necessarily bestowed  
 upon the thing *borrowed*, the *Law* not al-  
 lowing *inconsiderable Expences*; because  
 the *Borrower* has the use of the thing  
 which should compence these.

Precari-  
 um.

*Precarium* is, when anything is lent to  
 be called back at the *Lender's* pleasures,  
 wherein it differs from *commodatum*;  
 which imports always a *determinate time*  
 for making use of the thing lent.

*Deposi-*

*Deposition* is that *Contract* which is entered into by one Man's delivering any thing into the Custody of another to be kept gratis for his use ; and therefore because in this *Contract* the *Property* remains with him, who did *depositate* the thing, if it be lost, it is lost to him: and since *Depositions* are made for the behoof of him who does *depositate*, therefore the *Depositar* (for so we call him, in whose hand the thing is *deposited*) is only liable if the thing *deposited* was lost by the *Depositar*'s dole, or gross fault ; nam *depositarius tantum prestat dolum, & latam culpam* : But *Inn-keepers*, *Stablers*, and *Nautæ Masters of Ships*, are liable to most exact diligence ; in preserving the goods of *Travellers* and *Passengers*, which they bring into their Houses and Ships, and to repair and make up all the loss they may sustain while they are in the *Inns* or *Ships*, whether the prejudice come by the *Servants* or *Mariners*, or by *Strangers* ; which special kind of *Deposition*, is introduced by *Equity*, contrary to the *Common Rules* of *Deposition*, and which we have immediately from the *Civil Law*, and *edictum prætoris*, intituled, *Nautæ cautiones stabularis*, &c.

Tlt. I.

Deposition.

Nautæ  
cautiones  
Stab. &c.

As


Book III.



As in this *Contract*, the *Depositar* is liable to restore the same thing that is *depositate*, and not the *equivalent*; so he who *depositates* is obliged to pay the *Depositar* what he bestowed upon it, whilst it did lye beside him; for generally a *Gratuitous Office*, ought to prejudice no Man. But he cannot crave *Compensation* upon any Debt due to him by the Person who *depositates*, which is *singular in this Contract*, for he must first answer his trust.

Pledg.

*Pledg*, is the *Contract* whetebby one Man gives to another any thing, for the Receiver's Security of what he owes him, to be re-delivered upon Payment; and therefore, because the thing it self in *specie*, is to be re-delivered, if it perish during the *Impignoration*, without the gross fault or fraud of him who receives the *Pledg*, it perishes to the *Impignorator*; and because *Impignurations* are made for the advantage of the Giver and Receiver, (the one being concerned to get Money, or some such thing upon the *Pledg*, and the other to get a *Pledg* for security of his Money) therefore he who receives the *Pledg*, is liable to do such Diligence for preserving thereof, as prudent Men use to do in their own Affairs; but he is not liable for *culpa levissima*, the *Contract* being

being for the behoof of both Parties; Tit. I.  
and he will have *Repetition* from him,   
for what he profitably bestowed upon  
it during the *Impignoration*.

Sometimes what is *impignorated* is not Hypo-  
delivered, and then the Pledg is called an theque,  
*Hypothèque*, and the Law sometimes  
makes such *tacit Hypothèques* without  
*express Paction*, as where it makes the  
Corn growing upon Land, or the Goods  
brought into the House, to be liable to  
the *Heritor* for Payment of his Rent.

If one Man pays to another more than  
is due to him, or what is not due at all,  
the Law allows to him *Repetition* of what  
was unjustly payed; and this is called  
*condictio indebiti*, because by paying Condictio  
indebiti.  
to you, I oblige you *really* and *in effect* to  
repay what shall be found not to be *due*,  
or to have been *payed* more than was *really*  
*due*: but since this Obligation arises from  
the Payer's ignorance, therefore if he knew  
that what he payed was *due*, he will not  
get *Repetition*; but what he payed will  
be look'd upon as a *Donation*, but it must  
be *ignorantia facti*, for *ignorantia juris*  
availeth no Man: And since this repay-  
ment is only allowed by the *Principles of*  
*Natural Equity*; therefore if what was  
payed was due in *Equity*, though it was  
not

Book III. not due by *positive Law*, the Payer will  
 not get *Repetition*.

## T I T. II.

## Of Obligations by Word or Writ.

Obligation  
by Writ.

**S**ome Obligations require *Writ* to make them *binding*, whereas others require *Writ* only by way of *Probation*; that is to say, *cannot be proven without Writ, though they be valid, and binding without it.*

All Obligations for transmitting the real Right of Lands, or others to be perfected by *Writ*, do so far require *Writ* of their own Nature, that though the Bargain be solemnly and clearly ended by *Verbal Transaction*, yet there is still place to *refile*, or *locus penitentia*, till the *Writ* be signed.

Promises.

Though *Verbal Promises* do by *Our Law* bind the *Promiser*, yet because the *Position* and *Import* of words may be easily mistaken by the *Hearers*; therefore *Verbal Obligations* or *Promises* can only be proven by *Oath of Party*, and not by *Witnesses*, though the Sum be never so small.

Because

Because *Mens Subscriptions* may be easily counterfeited; therefore by an *express Statute* with *Us*, no Writ of Importance (which we interpret to be when it is granted for more than 100 *lib.*) is valid; except it be signed in presence of two *subscribing Witnesses*, if the Party can write; or by two *Notaries* and four *Witnesses* if the Party cannot write \*; except the Writ be *Holograph*; that is to say, all written with the Granter's own Hand, and that the *Writer* and *Witnesses* be *pecially designed* \*: and though the *subscribing* by two *initial Letters* be sustained, where it is proved that the *Subscriber* was in use so to *subscribe*; yet the *Granter's* mark is not sufficient, except the Verity of the affixing that Mark be referred to the *Granter's Oath*. And if the Sum, though exceeding 100 *lib.* be restricted to an 100 *lib.* the Obligation will be sustained, though it want *Witnesses*.

Tit. II.

\* R. J. 6:  
Par. 13.  
Act 175.

\* K. C. 2:  
Par. 3.  
Act 5:

Such is the *favour of Commerce*, and such *Expedition* it requires, that upon its *account*, *Bills of Exchange* are sustained; though they be not signed before *Witnesses*; and *delivery of Goods* upon *Bargains* are sustained to be prov'd by *Witnesses*; though there be no Writ, there being

Bills of  
Exchange.

Book III. being no Writ used in such cases. And  
 ~~~~~ such is the *favour of Contracts of Marriage*, especially where they are become  
*Notor* by *subsequent Marriage*; that they  
 are sustained though there be no *Wit-  
 nesses*.

Delivery of Writs. By *Our Law* an *Obligation* in Writ is not  
 binding, except it either be *delivered*, or  
 dispence with the not delivery, by a spe-  
*cial Clause* therein, *nam traditione trans-  
 feruntur rerum dominia*: but *Tradition*  
 is not requisite in *mutual Contracts*, or  
 where the Granter has an interest to  
 keep the Paper himself, as where his  
 Life-rent or Liberty to alter is reserved;  
 and if the Writ be in his hand in  
 whose Favours it was made, it is pre-  
 sumed to have been delivered, and can-  
 not be taken from him upon the pre-  
 tence of *not delivery*; except it be re-  
 ferred to his Oath, that it was never a  
 delivered Evident by the *Granter*.





## TIT. III.

*Of Obligations and Contracts arising from  
Consent, and Accessory Obligations.*

**T**Hough all *Contracts* require the consent of the *Contractors*, yet there are four, viz. *Emption*, *Location*, *Society*, and *Mandat*, which are said in a more special way to arise from Consent; because these *Contracts* are perfected by meer *Consent of Parties*, without any farther Solemnity, or Tradition: and thus how soon two Parties agree concerning the price of any thing that is to be sold, that *Contract* is by meer Consent so far perfected, that he hath the Seller precisely obliged to deliver the thing bought, and perfect the Sale; albeit the *Dominium* or Property be not transferred, but remains with the Seller until delivery: and if the thing bought perish without the Seller's fault even before delivery, the loss is the Buyer's, in respect of the personal Obligation upon the Seller to deliver it, and the *Buyer's Right is established* even before *Tradition*; and though *Earnest* or *Arles* be given Earnest.

*Contracts*  
perfected  
by Con-  
sent.

Em. &  
vend.

\*

as


Book III. as a *Symbol* or *Mark* of *Agreement*, yet the consent without the *Earnest* or *Arles* (as we call it) compleats the *Bargain*; and if the *Earnest* be in *current Money*, it is to be imputed as a *Part* of the *Price*.

In this *Contract* of *Emption* and *Vendition*, there must be a *Price* consisting in *Numerat* and *down told Money*; for if one thing be given for another, the Law calls that *Contract*, *Permutation*, or *Excambion*, and not *Emption* and *Vendition*: and this *Price* must be certain and definite; and if the *Price* be referred to another, the *Bargain* will subsist, except that third Party to whom it was referred; either will not or cannot determine the *Price*.

Location  
and Con-  
duction.

*Location* and *Conduction* is a *Contract* whereby a *Hire* is given, for the *Use* and *Profit* of any thing, or for the *Work* of *Persons*. It differeth from *Emption* and *Vendition* chiefly in this, that the design of the *Contract* is to transfer the *Property*; but in *Location* the *Property* remains with the *Setter*.

This *Contract* being entred into by the *mutual Consent*, and for the *Advantage* of both Parties, the *Conductor* is only liable to use and adhibit a moderate *Diligence*

gence, for preserving the thing set ; that Tit. III.  
is, such *Diligence as prudent Men adhibit*   
*in their own Affairs* ; so that if the same  
perish without his *gross and supine Negli-*  
*gence or Fraud*, he is not liable to make  
it up to the *Locator*.

*Location* or setting of *Lands* for a cer-  
tain hire, (called the *Tack-Duty*) is fre- Tack-  
quent in *Scotland* ; and it is to be obser- Duty.  
ved, that if the *Ground* yield *no increase*,  
but is absolutely *Barren*, without the  
Fault of the *Conductor*, the Hire will not  
be due, since that was given for the *Pro-*  
*fit and Use* of the *Ground* : But if there  
be not an *absolute Sterility*, and that  
the *Land* yield some Profit though ne-  
ver so little, the Hire will be due, if the  
Profit but exceed the expence of the *la-*  
*bouring*.

From this *Contract* there arise *two*  
*Actions* ; the one whereby the *Condu-*  
*ctor* is obliged to pay the Hire agreed un-  
to, and to restore the thing set after the  
end of the *Location*, in as good condition  
as he got it. The other is an *Action*  
whereby the *Locator* is bound to refund  
to the *Conductor* the necessary *Expences*  
imployed upon the thing hired, during  
the *Location*. *Vide supra* ; *Book II.*  
*Title VI.*

M

Society

Book III.



Society.

*Society is a Contract whereby several Persons oblige themselves to communicate Loss and Gain arising from the things common in the Society.*

All the *Partners* in the *Society*, do by the *Nature of this Contract* share equally, except it be otherwise provided; and if either the share of the *Gain* or *Loss* be expressed, the one regulates still the other: but because some *Mens Pains* are of as great *Value* as other *Mens Money*; therefore it is lawful and consistent with the *nature of Society* to contract so, as that one may have the *half of the Gain*, and no *Loss*: but the *Contract* would be null, if it were provided that one should have all the *Gain* and no *Loss*; for there could be no *Compensation*, though the other were never so skilful.

By this *Contract*, all the *Partners* are obliged to advance for the *Affairs of the Society*, according to the shares they have in it.

Ways of  
dissolution  
of Society.

The *Society* is *extinguished*, and the *Persons* who entered therein *loosed* therefrom, by the death of any of the *Partners*, or by their becoming *insolvent*, except it be otherwise provided; for this is a *Personal Contract*, wherein Men respect the *Humour* and *Industry* of one another, and so

to this Contract is dissolved by the *simple* Tit. III.  
*Renunciation* of any of the Partners; so  
 that every one has a *Negative Vote*, and  
 if the Society be entered into with this  
 condition, *that it should not be dissolved at*  
*the Option of any of the Partners, the*  
*Law does reprobate such Pactions:* and  
 from the *same Principle* likewise it is, that  
 Partners in a Society, are not liable for  
 farther diligence than they used to ad-  
 dit in their own Affairs, having volun-  
 tarily choosed one another for Partners;  
 for it is presumed they are satisfied with  
 one another's Diligence, the Contract be-  
 ing entered into for the behoof and profit  
 of all the Partners.

*Mandate*, is that Contract whereby *Mandate.*  
 one employs another to do, or manage any  
 Business gratuitously; for if he who is  
 employed get a Reward, it is not properly  
 a Mandate, but *Locatio operarum*, or a  
 seeing of the Person so employed; but  
 yet if the receiver of the Mandate has  
 been at any expence upon the account  
 of the Mandate, the Employer must  
 pay it.

He who receives the *Mandate* is obli-  
 ged to execute the same, according to the  
 Rules prescribed by the Employer, and  
 not to exceed the Bounds of his Mandate:

Book III. And therefore if *Titius* employed *Seius* to buy him such a particular piece of Land for 10000 *lib.* *Titius* is obliged to ratify his Bargain, though he buy it for 9000 *lib.* because *Ten* comprehends *Nine*; but if he pay 12000 *lib.* for it, he is not obliged to ratify the Bargain, because he exceeds the Bounds of his Commission.

*Mandates* expire either by the *Revocation* of the Employer, if the thing or business in which he was employed be entire; or by the death either of the Person employed, or of the Employer; or by the *Renunciation* of the Person employed: but in all those cases, if the thing undertaken be not intire, the Person employed, or his Heir, may and must proceed to execute the *Mandate*, notwithstanding of the *Revocation*, *Death*, or *Renunciation*. *Mandatars* are liable for exact diligence, & culpa levissima; because albeit the *Mandate* be only *gratia Mandantis*, yet the very Nature of it implies *Diligence*.

Diligence  
of Mandatars.

*Mandates* are either express, arising from express consent; or tacit, which are inferred by Signs and Taciturnity: as for instance, if a Person present suffers another to act in his Affairs, he is understood to give him thereby a tacit *Mandate*.

Div. of  
Mandates.

Secundo,

*Secundo*, Mandates are either *General*, Tit. III. *for managing all Affairs*; or *Special*, for doing some particular Business, conform to the precise tenor of the Commission: and albeit general Mandates contain most ample Power of Administration; yet they are not extended to committing of Crimes: Or,

Gen. and  
special  
Mand.

*Secundo*, to Donations; albeit where there is any probable cause Gratifications may be allowed, which will be regulated *secundum arbitrium boni viri*; this being *contractus bonae fidei*, which implies exuberant Trust.

*Tertio*, No general Mandate will imply a Power to alienate Immoveables; or to submit or transact any litigious business.

*Quarto*, If in the general Mandate some special Cases are express'd, it will not be extended to Cases of greater importance than those express'd.

The great favour of Commerce, has introduced another kind of tacit Mandate; by which Exercitors of Ships, and Prepositors are obliged by the Contracts of the Masters of the Ships, and of the Insitors, in relation to the Ships and Voyages; or to the particular Negotiations wherein they are intrusted.

M 3

Exercitor,


Book III. *Exercitor*, is he to whom the Profit of a Ship doth belong, whether he be the *Exercitor*. *Owner*, or hath only *freighted the Ship*; the *Master* is the Person intrusted with the *charge of the Ship*, who has Power to oblige the *Exercitor*, by *contracting for the Reparation and Out-rigging of the Ship*, and in Matters relating to the *Voyage*.

*Institor*. *Institors* are intrusted with *particular Negotiations at Land*, such as keeping of Shops, &c. and they oblige their *Prepositors*, in relation to the Affair wherein they are intrusted, as *Exercitors* are in *Maritime Affairs*.

Neither the *Master* of Ships nor *Institors*, need shew their *Commission*, but their being in the *Office* is sufficient to oblige the *Exercitors* and *Constituents*. And if there be *many Exercitors*, the *Master's Contract* obliges them all *in solidum*, albeit what was borrowed be not employed for the use of the *Ship*; only it must be known to the *Lender*, that the *Ship* stood in need of such *Reparations*: and the *facts* of the *Institors* will oblige their *Constituents* of whatsoever *Sex* or *Age* they be; and even though they be *Pupils*, *Minors*, or *Wives*, who cannot *validly oblige themselves*; for they have themselves to blame who intrusted such Persons.

As



As all those *Obligations* and *Contracts* Tit. III.  
arise from *express consent*, so others arise from *tacit consent*, such as *Homologation*;  *Homologation*.  
As for instance, though a Man be not obliged by a Bond granted in *Minority*; yet if he pay a part of it, or *Annual Rent* for it, after he is *Major*; the *Obligation* is thereby *homologated*, or *own'd*, and becomes *valid*, not from the time of the *Homologation*, but from the date of the *Writ*: and therefore it is fit that such as design not to own null or *invalid Deeds*, should abstain from doing any thing that may *infer* an *Approbation* of them; but because *Homologation* is *actus animi*, therefore it should not be proved by *Witnesses*.

Because all *Obligations* cannot be bound up under *general* and *regular Names of Contracts*; therefore the *Law* allows some *Obligations* to pass under the Name of *Quasi Contractus*, because they have the *resemblance*, and are of the Nature of *Contracts*; and these are *Negotiorum Gestio*, whereby if any Person manage your *Business* *advantageously* for you, you are liable to him for his *expence* though you gave him no *Mandate*, lest such as are absent should be *prejudged* by the *Negligence* of their *Friends*, Quasi contractus.  
Negotiorum Gestio.

Book III. and their averfnefs to meddle with other Peoples Affairs where they are to have nothing allowed them for their expences. As the *Manager* is liable to refund to the *Person whose Affairs he managed* any *Prejudice* done to him ſince, elſe any Man might be *invited officiouſly* to meddle in another Man's Affairs to his *diſadvantage*; but this is to be underſtood, *ſi inutiliter geſſeret*: otherwiſe if he acted *profitably*, albeit the Event do not ſucceed, he will get his *Expences*.

Tutory.

The other *quasi contractus*, are *Tutory*, *communion of Goods*, *entring Heir*, the *Obligation of Re-payment that ariſes upon Payment of what is not due*: For if one be Tutor to you, he enters in a kind of Contract with you, whereby he is bound to adminiſtrate your Affairs, and you are bound to pay him his *Expence*. But of all theſe I have treated elſewhere in their proper Places, as I ſhall do of *Malefices*, and what reſembles them, when I come to treat of Crimes, of which theſe may be properly ſaid to be *Branches*.

Cautio-  
nary.

Having thus treated of *Principal Obligations*, the only *Accessory Obligation* that I need mention is *Cautiory*, whereby one Man becomes *Surety* for another, either to pay a *Sum*, or perform a *Deed*; betwixt

betwixt which two there is this difference, Tit. III.  
 that these that are *Cautioners for a Sum*,  
 if they be bound conjunctly and severally with the *principal Debtors*, may be pursued without pursuing the *Principal*:  
 and *quoad* the *Creditor* they are *Principals*: but these who are *Cautioners* for performing of *Deeds*; as *Cautioners for Executors and for Curators or Factors*, or for *Messengers*, cannot be pursued till the *Principal* be discussed; for they being only obliged that their *Principals* shall *Compt* or be *Honest*, therefore they cannot be liable until the *Principals* first be cited to compt in the one Case, or to answer for their *Delinquencies* in the other; and they are only liable to make up what is wanting from their *Principals* after they are discussed.

Because *Cautioners* for Sums bound conjunctly and severally, are liable as *Principals*; therefore their *Obligation* may subsist, though the *Obligation of the principal Party* be found null, or reduced by any Privilege given to the *Principal* by Law: as if a Man become *Caution* for a *Minor*, or for a Woman who is married, *Nam sibi imputet*, who became a *Cautioner* for such; but if the *Obligation* was absolutely null in it self, as if the *Principal*

Book III. *pal* did not sign, then this *Obligation* because it is but *Accessory*, retains so much of its own *Nature* as to free the *Cauti-  
oner*.

Relief of  
Cautio-  
ners.

*Cautioners* are to get *Relief* from their *Principals*, not only of the principal *Sums* and *Annual Rents*, but of all *Damage* and *Interest*, and whether the same be provided by the *Bond*, or not; and where there are many *Co-cautioners*, they are liable in *solidum*, quoad the *Creditor*: But if any of them pay the whole *Sum* to the *Creditor*, though he get assignation from him to the whole, yet he must only seek his *Relief* from the other *Cauti-  
oners*, with deduction of his own *Part*, which proceeds albeit there be no *Clause* of *mutual Relief* in the *Bond*; and they must communicate to their *Co-cautioners* what *Ease* they get by way of *Trans-  
action* from the *Creditor*; but if they get the said *Ease* by a meer *Gratification*, as by *Donation*, &c. then they are not bound to communicate what *Ease* they get; for a *Creditor* may justly gratify one of his *Cautioners* as his *Friend* or *Re-  
lation*, without being obliged to gratify the rest.

\* Subject-  
Matter of  
Obliga-  
tions.

To make *Obligations* effectual, it is necessary that the \* *Subject-Matter* thereof be

be such as will admit of an *Obligation*: Tit. III.  
 For no Man can oblige himself to do what is either *impossible*, *unlawful*, or *dishonest*, nor to transmit the *Property* of things *Sacred*, (these not being in *Comercio*;) and albeit when the *Performance of Obligations* becomes *imprestable*, the *Party* is liable for the *Value*, as *Damage* and *Interest*; yet in these the *Value* is not *due*, nor will he be liable in a *Penalty*, in case of not-performance.

But yet a Man may oblige himself to do something not in his own Power, as to cause another *dispose Lands*; and if he fail, he will be liable *pro damno & interesse*, or for the *Penalty*.

Amongst *Obligations*, *Donation* is also *Donation*. reckoned, which is an *Obligation proceeding from a lucrative Cause or Title*: For he who *voluntarily* and *gratuitously* promises to give any thing, is thereby obliged to deliver the same; and this *voluntary giving* is called a *Donation*, which is in *Law* defined to be a *meer Liberality proceeding from no previous Compulsion*.

It may be perfected either by *Writ*, or without it; but if without *Writ*, it must be proven by *Oath*.

*Donations* are either *Simple*, *Remu-* Div. of  
*neratory*, or *Mortis causa*, that is to *Donat.*  
 † say,

Book III. say, *Donations made in Contemplation of Death.*

Remun-  
eratory Do-  
nations.

A *Remuneratory Donation*, called 'Αντιδορον, is when a Man bestows any thing not gratuitously, but to requite and repay some good Deed done, or to be done to him, and so is not purely a *Donation*.

Donation  
in Con-  
templa-  
tion of  
Death.

A *Donation in Contemplation of Death*, is when the Giver designs rather the Person to whom he gifts to have what is gifted than any other; but wishes himself to have it, rather than him to whom he gifts it. And therefore though pure *Donations* are not revokable, yet a *Donation Mortis causa*, is being of the Nature of a *Legacy*; and no *Donation* is presumed to be *Donatio Mortis causa*, except it appear to be so either expressly, or by strong Presumptions, that the thing gifted, was only gifted in *Contemplation of Death*.

Gifts, being a meer *Liberality*, are not presumed; and therefore by *Our Law*, *Debitor non presumitur donare quamdiu est debitor*: But this being only a *Presumptio Juris*, may be taken off by stronger Arguments, justly inferring, that *Donation* rather than *Payment* was designed.

TIT.



## T I T. IV.

## Of the Dissolution or Extinction of Obligations.

**H**AVING cleared how *Obligations* are constituted, it remains now to consider how they are *taken off* and *extinguished*; which is either by a *Contrary Consent*, or by *Implement* and *Satisfaction*.

Since *Consent* is necessary to the *Constitution of Obligations*; so a *contrary Consent*, whether by a *Discharge*, or *patium de non petendo*, does dissolve and extinguish *Obligations*; *nam nihil est tam naturale, quam eo genere quidque dissolvi quo colligatum est*: And therefore if the *Obligation* be constituted by *Writ*, it requireth *Writ* to the Dissolution thereof, which is called a *Discharge*; and *Discharges* require the same Solemnities that *Obligations* do; but yet, if the *Obligation* was satisfied, *via facti*, as by *Intromission* with Rents of Lands, &c. it is probable by Witnesses, as all Facts are.

*Discharges*

**Book.III.** *Discharges* are either *general* of all that *Parties* can ask or claim, or *particular* of one particular thing or subject : *Discharges* general and particular.

And in *general Discharges*, if any particular thing be expressly discharged therein, the *general Clause* will be extended to Particulars of no greater importance than those expressly discharged.

Apocha  
trium an-  
norum.

*Discharges* do ordinarily bear a *Clause* discharging all *Precedings* till their *Date*; and albeit they do not, yet three consecutive *Discharges*, do presume that all by-gones are satisfied if they be immediately subsequent to one another, and granted by *Parties*, having Power to discharge, as *Discharges* by *Heritors* or *Chamberlains* to their *Tenants*; and therefore *Discharges* of three subsequent *Years* granted by *Merchants* who bought the *Ferm* of these *Years*, will not infer the presumption; but it will be inferred by *Discharges* for a part of the three *Years* granted by the *Father*, and the rest by his eldest *Son*, as *Heir*; the *Discharges* being in *Writ*, containing a discharge of the whole *Year's Rent*; so that *partial Receipts*, albeit they extend to more than the *Year's Rent*, will not presume that all *Precedings* are payed; neither one *Discharge* for three subsequent *Terms* or *Years*,




*Years, the Presumption being inferred Tit. IV. from renewing of the Discharges each Tear without Reservation.*

*Obligations are extinguished and dissolved by Payment, which is, performing Payment. of the Obligation in the precise terms thereof, and is so favourable, that if it be made bona fide, it dissolveth the Obligation, albeit he to whom it was made had no Right: so Payment made to a Procurator after the Procuratory was revoked without the Payer's knowledge, will be sustained; and Payment made to Ministers serving the Cure, though they have no Title to the Benefice, will liberate the Payers.*

*Obligations are likewise fulfilled by Ac- Acceptilation, which is an imaginary satisfaction. ceptilation, whereby the Creditor acknowledges to have got Payment when he hath not, and has the Effects and all the Privileges of Payment.*

*Secundo, by Compensation, whereby if Compensation. the Creditor of a liquid Sum become Debitor to his Debitor in another liquid Sum, the two Obligations extinguish each other ipso jure, and is equivalent to Payment in all Cases; but if the Sums be not liquid, or if a Species or Body be craved to compensate a liquid Sum, it will not be allowed.*

*Tertio,*

Book III. *Tertio, Obligations* are taken away by  
 *Innovation*, which is, the *changing one*  
 Innova- *Obligation for another*; and if the Person  
 tion. of the *Debitor* be changed, it is called *De-*  
*legation*.

*Innovation* is never presumed except it  
 be *expresly mentioned*, or that the *Obliga-*  
*tion* bears *expresly* to be in *satisfaction of*  
*the former*.

*Quarto, Obligations* are extinguished  
 Confusion. by *Confusion*; that is to say, when the  
*Debt* and *Credit* meet in the same *Per-*  
*son*; as when the *Debitor* succeeds to the  
*Creditor*, or the *Creditor* to the *Debitor*,  
 or a *Stranger* to both: and the reason of  
 the *Extinction* in these cases is, because  
 the same *Person* cannot be both *Debitor*  
 and *Creditor*.

## T I T. V.

## Of Assignations.

NOT only Moveable, but Heritable  
 Rights whereupon no Infeftment  
 has followed, and all Incorporeal Rights  
 requiring no Infeftment, such as *Rever-*  
*sions, Patronages, Servitudes, &c.* are  
 transmissible by Assignation: But if Seafin  
 be

be once taken on an Heritable Right, it Tit. V. cannot thereafter be transmitted by *Assignation*, but by *Disposition*, which is a *Writ* *Disposition* disposing Lands or other Moveable Rights, containing a Precept of Seisin and Procuratory of Resignation: And though a Life-rent at first is to be compleated by a Seisin, as differing from other Heritable Rights only in its Endurance, yet being once compleated, it may thereafter be transmitted by *Assignation*; for it continues not then to be a formal Life-rent-Right in the Person of the *Assignee*, but resolves only in a temporary Right during the *Cedent's* Life-time.

He who grants the *Assignations* is called the *Cedent*, and he who receives it, is called the *Assignee*. *Cedent and Assignee.*

An *Assignation* is also compleated by Intimation; and therefore in competition Intima- betwixt divers *Assignees*, the first *Intima- tion* is always preferred: This *Intimation* is made by a *Procurator*, who takes *Instruments* in the hands of a *Notar*, that such an *Assignation* was *intimated*, (so that one Man cannot be both *Notar* and *Procurator*;) and if after this the *Debitor* pay the *Cedent*, he must repay it to the *Assignee*, because the *Cedent* was denudded by the *Assignation*; and the Intima-  
N tion

Book III.

tion puts the *Debitor* in *mala fide* to pay the *Cedent* : and for that same reason, the *Cedent's Oath* will not prove against the *Assignee*, if the *Assignation* be for an *onerous Cause*.

But if the *Assignation* be *gratuitous*, or for the *Cedent's* behoof ; or if the matter be *litigious*, the *Assignation* being after a *depending Process*, in any of these Cases the *Cedent's Oath* will prove against the *Assignee*.

A *Pursuit* or *Charge of Horning* upon the *Action assigned*, has likewise the force and effect of an *Intimation*.

The *Debitor's* private knowledg of the *Assignation*, is not equivalent to an *Intimation* ; but his paying a part of the *Sum* or *Annual Rent* for it, is equivalent to an *Intimation* ; and much more the writing a *Letter* promising to pay, since that is in effect a *renewing the Obligation*.

*Bills of Exchange*, and *Orders by Merchants* to pay, need not be *intimated* ; because in *Commerce* we are governed by the *Law of Nations* : nor need *Assignations* to *Reversions* be *intimated*, because the *Registration* is a *Publication* of them, (the *Registration* of *Seasins* and *Reversions* being designed for *Publication*.) But the using *Inhibition* against the *Cedent* upon

upon the *Assignation* is not equivalent to an *Intimation*, the chief design of Inhibitions being for Execution and not for Publication. Legal and Judicial Assignations, such as *Apprisings*, *Adjudications* and *Marriage*, need no *Intimation*; and that because they are past, and expedite publicly.

A *Blank Band* is equivalent to an *Assignation*, and so must be intimated; and in competition with other Rights, it is only preferred according to the date of the *Intimation*, that the Receiver's name was filled up in it.

It is a general Principle in Our Law, that in the competition of *more Creditors*, the first complete *Diligence* is still preferred: And therefore an *Assignation* is preferred to an *Arrestment*, if it be intimated before the *Arrestment*; but if the *Intimation* and *Arrestment* be in one day, they come in *pari passu*; except the *Arrester* be in *mora*, and do no *diligence* upon his *Arrestment*. Or, that both *Diligences* express the hour of the Day, and the one be prior to the other.



TIT. VI.

*Of Arrestments and Poyndings.*

**T**He ordinary Diligences in Our Law affecting Moveable Rights, are Arrestment, which answers to Inhibition in Heritage; and Poynding, which answers to Comprising in Heritage.

Arrest-  
ment.

Arrestment is the Command of a Judge, discharging any Person in whose hands the Debitor's Moveables are, to pay or deliver up the same, till the Creditor who has procured the Arrestment to be laid on be satisfied.

Arrestments may be laid on by any Judge in whose Territories the Goods are, or by the Lords of the Session wherever they lye, and that by special Letters of Arrestment; or by a Warrant express'd in the ordinary Letters of Horning: these Letters are executed by a Messenger; and if after it is laid on, the Party in whose hands it is made, pay, he may be forced to pay the same over again, or may be pursued Criminally for breaking Arrestment, the Punishment being Confiscation of Moveables, and their Persons to be in the King's Will \*.

\* K. J. 6.  
Par. 7.  
Act 118.

Arrest-

*Arrestment* can only affect *Moveables*; Tit. VI. but all Sums of Money due by Bonds, whereupon no Infestment has followed, are *Arrestable* \*: And as *Moveables* can only be *arrested*, so the ground thereof must only be for Payment of Moveable Debts, or *ex paritate rationis* for Payment of such Debts, which are not secured by Infestment; and it reaches only to the Sums already due, or for which the Year or Term is current.

How soon an *Action* is raised against a Person, his Goods may thereupon be *arrested*, and this is called an *Arrestment* upon a *Dependence* \*: but this *Arrestment* may be loosed by Letters for loosing of *Arrestment*, which passes upon a *Common Bill*: and a *Band of Cautionry* is given to the *Clerk of the Bills* \*, wherein the *Granter* of the *Band* obliges himself to pay the Sum, if the *Arrestment* be found lawful, and the Sums or Goods decreed to belong to the *Arrester*; but *Arrestments* upon a *Decreet* (or which is *equivalent*) on a *Registrate Band*, cannot be loosed at all, except the *Decreet* be turned into a *Libel*; that is to say, the Lords do only sustain the *Decreet* as a *Libel* or *Summons* against the *Defender*, or that the *Arrestment* was laid on after the

\* K. C. 2.  
Par. 1.  
Sess. 1.  
Act 51.

\* Arrest.  
upon a  
Depend.

\* K. Ja. 6.  
Par. 22.  
Act 17.

Book III. Decreet was suspended; for in either of these Cases *Arrestments* may be loosed even upon Decreets.

*Arrestment* being but a *personal Prohibition* against the Defender to pay, it lasts no longer than the life-time of him in whose hands the *Arrestment* is made, except it be renewed against his Successors; but it dies not with him in whose favours it was raised, nor with him for whose Debt it was laid on; and if the Debt be not *liquid*, the *Debitor's Representative* must be called to the *Liquidation*.

Competition of Arrestment.

In the *competition* amongst more *Arresters*, preference is granted according to the *priority even of Hours*; and the first Arrestment is not preferred, if the *posterior Arrester* get the first Decreet, to make the arrested Goods forth-coming; for *Arrestment* being only an *inchoated Diligence*, it is compleated by the Sentence to make forth-coming; and yet if the Arrestier did exact Diligence to obtain a Decreet, his raising the first Pursuit will prefer him. He also who arrests on a *Decreet*, will be preferred to him who arrests on a *Dependance*; and he who arrests after the term of Payment, will be preferred to him who arrests before the term, *ceteris paribus*. † The



The *King's Pensions* and *gratuitous Tit. VI.*  
*Aliments* cannot be arrested, because they  
 are given for a particular and favourable Use, and not applicable to the Arrest.

*Poynding* may be likewise used against *Poynding.*  
 Moveables by virtue of *Letters of Horning* against the *Debitors*, containing *Poynding*, or any other inferior *Judg*, his *Decree* or *Precept* \*, which is done by a *Messenger* after the days of the Charge are expired † : the form thereof is, The *Messenger* after *poynding* the Goods, *apprises* them upon the *Ground* where he *apprehends* them, and offers them to the *Debitor* for the *Sum* for which they were *apprised* ; and if he compear not, he carries them to the *Mercat-Cross* of the head *Burgh* of the *Shire*, or other *Jurisdiction* where they are *poynded*, and there he *apprises* them, and delivers them to the *Party*, who is called the *Poynder* : but if any compear, and offer to *make Faith* that the Goods belong to them, and not to the *Debitor*, then the *Messenger* must deliver them to that *Party*, else he is liable in a *Spulzie*.

*Poynding* is a *judicial Sentence*, and the *Messenger* is *Judg* constituted by the *Letters* ; the *Messenger* writes likewise an

\* K. Ja. 6.  
 Par. 12.  
 Act 10.  
 K. C. 2.  
 Par. 1.  
 Sess. 1.  
 Act 29.  
 † K. C. 2.  
 Par. 1.  
 Sess. 1.  
 Act 4.

Book III. *Execution of Poynding*, and that *Execution* is better believed than any who offers to prove the *contrare*; for that *Execution* is only quarrelable by *Improbation*.

*Arrestment* being but an *inchoated diligence*, discharging the *Party* in whose hand the *Arrestment* is made to pay, the *Right* to the *Goods arrested* remains still in the *Debitor*, and may be *poynded* for his *Debt*; for *Poynding* is a *compleat diligence*, giving an absolute *Right* to the *Goods poynded*.

*Poynding* cannot be after the *Sun* is set; for it is a *Sentence*.

Labouring  
Oxen.

Labouring *Oxen*, or other *Plough Goods* cannot be *poynded* in time of labouring, (lest labouring should be otherwise discouraged) except there be no other *Moveables* upon the *Ground* to be

\* K. Ja. 4: *poynded* \*.

Par. 6.

Act 98.

## T I T. VII.

### Of Prescriptions.

**P**rescription being a way of *evacuating* and *annulling* both *Heritable* and *Moveable Rights*, comes in here after both these are explained,

*Prescrip-*

## Of Prescriptions.

185

*Prescription* is defined, an *Acquisition of Property by the Possessor's continuing his Possession for such time as the Law determines*; Which was introduced not only for punishing the *Negligence of the Proprietar*, who owned not his Right for so many Years, but likewise for securing Possessors, and such as derived Right from them; and lest by a constant uncertainty the Possessors being unsecure, might neglect the *Improvement of what they possessed*.

Tit. VII.

Prescription.

*Heritable Rights*, (under which I comprehend *Wadsets, Heritable Offices, Servitudes, Patronages, &c.*) and all Actions depending upon them, or relating to them, prescribe with us in 40 Years; if the Possessor being a *singular Successor* have a *Charter, Disposition, or Precept*, and *Seasin* in his Person; or being an *Heir*, have a constant tract of *Seasins* continuing and standing together for the space of 40 Years, flowing upon *Retoures*, or *Precepts of Clare Constat*: For the Law did not trust a *Seasin* alone, it being only the *Affertion of a Notar*; but *Reversions* which are in the Body of the Possessor's Right, or *Reversions* duly *registered*, prescribe not.

Prescript.  
of Heritable Rights.

K. J. 8.  
Par. 22.  
Act 12.

All

Book III. All *Personal Rights* and *Actions* relating to them, prescribe likewise in 40 Years: If a *Document* be not taken up-  
 Prescript. of Personal Rights. on that Right, that is to say, *If nothing be done whereby the true Proprietar declares his Intention to follow and own his Right* \*.

\* K. Ja. 3.

Par. 5.

Act 29.

Par. 7.

Act 55.

In both these *Prescriptions*, the extraordinary length of time supplies the want of *bona fides* in the *Possessor*. But by the Civil Law, *things Sacred, Religious or Publick*, could not be prescribed; nor yet things robbed or stolen, there being a *victim* real which affects all those things; but whether this will hold in our Law, is neither clear by our Statutes nor Decisions.

Prescriptions of particular Actions.

*Actions of Spulzie* and *Ejection*, prescribe in three Years after committing thereof; as to the *Specialities* of these Actions, viz. The violent *Profits* and *Oath in litem*: But *Minors* have three Years after their *Majority* \*.

\* K. Ja. 6.

Par. 6.

Act 82.

As do also Actions for *Servants Fies*, *House-meals*, and *Merchant-compts*; except they can be proven after these three Years by the *Debitor's Oath* †: And *Removings*, if Action be not intended without three Years after the warning ||; and in these last Prescriptions *Minority* is not excepted. If

† K. Ja. 6.

Par. 6.

Act 83.

|| K. Ja. 6.

Par. 6.

Act 82.

If *Assizers* err in serving a Man wrongfully *Heir* to his *Predecessor*, the *Return* may be quarrelled within 20 Years; but the *Assizers* themselves can only be pursued for *Error* within three Years\*, but the Right of *Blood* it self never prescribes: and therefore a Man may be served *Heir* to his *Father* or *Grandfather*, after 100 Years, being debarred by no time, *nam jura sanguinis nullo jure civili adimi possunt*: But this is to be understood where there is no Service; for if there be once a Service, though of a wrong Person, it cannot be quarrelled after Twenty Years.

Tlt. VII.

Assizers.

\* K. J. 6.

Par. 22.

Act 13.

If a Person who is *forefaulted*, possessed *Lands* as *Heritable Tenant* for five Years before the *Forefaulture*, without interruption, the *King* is obliged to show no Right in the Person of him who was *forefaulted* to the *Lands*, or others that he possessed; because it's presumed that the Person *forefaulted* would abstract the *Writs*, which *quinquennial Possession* is to be tried by an *Inquest of the Shire where the Land lyes*. And if the *Traitor* was in Possession the time of the *Forefaulture*, though he possessed not five Years before the *Forefaulture*, the *King* or his *Donator* must be continued in Possession for five Years,

K. Ja. 6.

Par. 9.

Act 2.

Book III. Years, that in the mean time the *Traitor's* Tacks and other Rights may be sought out.

*Arrestments on Decrets* and depending *Actions* prescribe within five Years, viz. *Arrestments on depending Actions* five Years after Sentence, and on *Decrets* five Years after their date.

*Meals and Duties* due by *Tenants*, prescribe, if not pursued within five Years after the *Tenant's* removing. *Ministers Stipends* and *Multure*s prescribe, so that they cannot be pursued, after five Years, except they be proven by the *Debitor's Oath*, or by *Writ*.

*Holograph Bands*, and *Subscriptions* in *Compt Books*, prescribe in twenty Years, except they be proven by the *Debitor's Oath*.

And lastly, all *Bargains* provable by *Witnesses*, prescribe as to that manner of Probation, if not pursued within five Years after their date; all *Actions on Warnings*, *Spulzies*, *Ejections*, *Arrestments*, *Ministers Stipends*, &c. prescribe within ten Years, unless wak'ned every five Years; but this alters not any shorter *Prescriptions* of these *Actions* \*.

\* K. C. 2.  
Par. 2.  
Scff. 1.  
Act 9.

And for clearing the meaning of the Statute appointing these Prescriptions, by


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a late Statute, *Anno* 1685, it is ordained Tit. VII.  
 that all those Actions mentioned in the  
 said Act 1669, which were intended or  
 depending before the date of the said Act  
 1685, should prescribe within five Years  
 thereafter, if they be not wakened within  
 that time; and all Actions to be intended  
 after the said Act should prescribe within  
 five Years, if they be not wakened within  
 that time.

All these *Prescriptions* run *de Momento*  
*in Momentum*, so that the *Prescription*  
 runs till the last moment of the time al-  
 lowed; but they run only from the time  
 wherein the Debt could have been pur-  
 sued, since till then the *Proprietar* could  
 not be called negligent, which Negligence  
 is the main foundation of *Prescriptions*:  
 and therefore *Prescription* runs not a-  
 gainst a *Band* from the date thereof, but  
 only from the term of Payment: and  
*Prescription* of an Action of *Warrantice*  
 runs only from the *Eviction* \*, because no \* K. Ja. 6.  
 Man is liable in *Warrantice*, till the Par. 22.  
 Lands be *evicted*; and from the same Act 12.  
 Principle it is, that *Contra non Valentem*  
*agere non currit Prescriptio*; and that  
*Prescription* runs not against *Minors* in  
 most Cases, in whom Negligence is not  
 punishable, since it proceeds from no

||

Design,

Book III. *Design*, but from the *Unripeness* of their  
 *Age*.

*Vassals* cannot prescribe against their *Superiours*, because the *Vassal's Right* acknowledges the *Superiours*; nor can *Layicks* prescribe a Right to *Teynds*, being incapable of such Rights after the *Lateran Council*; but though the Right it self prescribes in neither of these Cases, yet the by-gones due by *virtue* of these Rights before *Forty Years* may prescribe.

Prescription.

*Prescription* runs against the *Kirk and Mortifications*: but on the other hand, because *Churchmen* are negligent, and *Rights* may be lost in the change of *Intrants*; therefore *thirteen Years* possession is sufficient to maintain a *Churchman* in possession; which is called *Decennalis & Triennalis Possessio*, and is a *presumptive Title*, and sufficient till a better be shewn, by which it may be excluded; for *Præsumptio cedit veritati*.

*Prescriptions* run likewise against the *King*, except as to His Majesty's annex'd Property, or to his un-annex'd Property; whereof the *Ferms, Duties, or Feu-ferms*, have been compted for in *Exchequer*, since *August 1455 Years* \*.

\* K. C. I.  
 Par. 1.  
 Act 12.

Any Deed, whereby the true Proprietar owns his Right during the course of the  
*Pre-*



*Prescription*, is called *Interruption*; and Tit. VII. *Prescription is interrupted in Our Law*, either by a *Process* or a *Charge raised within the Years of the Prescription*; and

Interrup-  
tion.

a Citation on the first *Summons* interrupts, tho thereafter past from *pro loco & tempore*; but registration of a Writ interrupts not Prescription: And *Interruption* by *Citation* is not sufficient, unless it be made by *Messengers* personally, or at the Party's Dwelling-house, and that it be renewed every seven Years \*; and that the *Execution* be signed by the *Messenger* and *Witnesses*.

\* K. C. 2.  
Par. 2.  
Sess. 1.  
Act 9.

Diligence used upon a Writ interrupts, as to all Parties concerned therein, for it hinders the Writ it self to prescribe: And therefore Diligence against any of moe Principals, or against any of the *Cautioners*, interrupts *Prescription*, quoad the whole Principals and *Cautioners*; and Interruption as to a part interrupts the *Prescription* of the whole; so that if a Man arrest the Meals and Duties of any part of a *Barrony*, he interrupts *Prescription* as to the whole *Barrony*.

T I T. VIII.

*Of Succession in Heritable Rights.*

**H**AVING formerly shewed how *Rights*, whether *Heritable* or *Moveable*, *Real* or *Personal*, are constituted, and how they are transmitted to singular *Successors*: It remains now to consider how these *Rights* are transmitted by *Succession*, beginning first with *Succession* in *Heritage*.

Heir.

An *Heir*, is he that *succeeds universally to all that belonged to the Defunct*; and is therefore in construction of Law, *one and the same Person with the Defunct*.

Though the *Executor* be in effect the *Heir* in *Moveable Rights*, yet we call those only properly *Heirs who succeed in Heritage*; and with us there are several kinds of *Heirs* distinguished by their several *Denominations*.

Heir of  
Line.

The first and chief kind of *Heirs*, are the *Heirs of Line*; who are so called, because they succeed *lineally* according to the *Right of Blood*; and they succeed thus:

Descen-  
dants.

First, *Descendants*, according to the *Proximity of their Degree*, in which the eldest

eldest Son is preferred to all his Brothers, Tit. VIII. and all the Brothers to the Sisters; and if there be only Sisters, they succeed all equally.

The next degree is *Grand-children* and their *Great-grand-children*, &c. who succeed all in the same way.

If there be no *Descendants*, then *Collaterals* succeed, in which the first degree is *Brothers and Sisters German*, for the whole Blood excludes the half Blood, and Brothers the Sisters, and Brothers by the Father's side exclude Brothers by the Mother's side; there being no Succession with us by the Mother's side.

*Failing Descendants* and Brothers and Sisters, whether *German* or *Consanguinean*, the Succession ascends first to the *Defunct's* own Father, who excludes all his own Brothers and Sisters, the *Defunct's* Uncles and Aunts; and failing them, the Father's Brother, (observing the same Rules formerly mentioned in the succession of Brothers and Sisters) and failing the Father's Brothers and Sisters, the Grandfather; and after him his Brothers and Sisters the same way; according to the *Propinquity* of Blood, and so upwards as long as any *Propinquity* can be proven; all which failing, the King succeeds as *Ultimus Hares*.

## Book III.


Right of  
Represent-  
tation.

Heirship  
Movea-  
bles.

It is to be observed, that in *Heritage* there is a *Right of Representation*, whereby the *Descendants* exclude still the *Collaterals*, though nearer by many degrees to the Stock, or *Communis Stipes*: And thus the *Great-grand-child* of the eldest Son secludes the second Brother, because he comes in place of, and so represents the elder Brother, his *Great-grand-father*.

The *Heir of Line* has Right to the *Heirship-moveables*, and excludes all other *Heirs* therein; *Heirship-moveables* are the best of each kind of *Moveables*, which are given to the *Heir*, because he is excluded from all other *Moveables*: if there be *Pairs* or *Dozens*, he gets the best *Pair* or *Dozen*; but in others he gets only one single thing. None have Right to *Heirship-moveables* but the *Heirs of Prelates*, under which are comprehended all *Beneficed Persons*; the *Heirs of Barons*, under which are comprehended all who are *invested in Lands* or *Annual Rents*, though not erected in a *Barrony*; and the *Heirs of Burgessees*, by which are meant *Actual Trading*, but not *Honorary Burgessees*: and if a Man was once a *Baron*, he is still presumed to continue so, except it can be proved that he is *devested*; and that is the sense of the *Brocard, Semel Baro semper Baro*.

Am

An Heir of Conquest, is he who succeeds *Tit. VIII.*  
to the Defunct in Lands and other Heri-  
table Rights, to which the Defunct did not   
himself succeed as Heir to his Predecessors; Heir of  
Conquest:  
as for instance, what a Father leaves to a  
second Son is Conquest; though he got the  
same from his Father, because he was not  
*alioqui successurus*: But if the Father  
dispose to his eldest Son any part of his  
Estate, this is not Conquest, but *Præceptio*  
*Hereditatis*; because he was *alioqui suc-*  
*cessurus*: And the Rule is, that *Heritage*  
descends, and *Conquest* ascends; so that if  
the middle of three Brothers die, his im-  
mediate elder Brother would be his *Heir*  
*of Conquest*; and if a Son of a second  
*Marriage* die, leaving three Brothers of  
a former *Marriage*, the youngest would  
succeed in his Conquest-Lands; and this  
I conceive was introduced, for enriching  
the elder Brothers, whom *Our Law still*  
*favours*; whereas *Heritage* must descend  
according to the *Law of Nature*.

These *Heirs of Conquest* have Right to  
all *Lands, Annual Rents, Heritable Bands,*  
and others, whereupon *Infestment* did or  
might follow, but they have no Right to  
*Tacks, Pensions, moveable Heirship,* and  
all other *Rights* having *Tractum futuri*  
*temporis*, and requiring no *Infestment*,

Book III. and so not competent to Executors ; all  
 ~~~~~ which belong to the *Heir of Line*.

Heirs Male. The *Heir Male* is the nearest *Male*  
 who can succeed ; and all *Heirs of Line*,  
 General are also called *General Heirs*, because  
 Heirs. they succeed by a general Service, and  
 represent the *Defunct* universally.

Heir of The *Heir of Tailzie*, is he to whom an  
 Tailzie. *Estate is tailzied*, so called, because the  
*legal Succession* is cut off in his favours  
 from the French word, *tailer*, to cut ; and  
 the matter of *Tailzies* may be summed  
 up in these few *Conclusions*.

*Primo*, If a Fiar or Proprietar do only  
 substitute the Persons who are to succeed  
 one to another, this is called a *Simple De-*  
*stitution* ; and it may be broke or altered  
 by the Maker, or by the respective Mem-  
 bers as they succeed, even though an In-  
 hibition were served thereon ; for there  
 being no Obligation not to alter, there  
 can be no foundation for an Inhibition:

*Secundo*, If the Maker design that his  
*Tailzie* should not be altered, he either  
 adjects a prohibitory Clause *de non alie-*  
*nando*, and then though the Maker may  
 alter it, yet neither the *Institutes* nor *Sub-*  
*stitutes* can alienate by any voluntar or  
 gratuitous Deed ; for else that Deed would  
 be reducible on the *Act of Parliament*

1621,

1621, as done in prejudice both of the Maker and of the *remoter Substitutes*, who are to succeed, and who are *Creditors* by the said prohibitory Clause: Or Inhibition may be raised upon the said prohibitory Clause, after which the *tailzied* Lands cannot be disposed, even for an *Onerous Cause*. Tit.VIII.

*Tertio*, If the Maker design that the *tailzied* Lands should not be alienable, even for *Onerous Causes*, then he adjects to the *Pactum de non alienando*, a Clause *irritant & resolutive*, declaring all Deeds done contrair to and in prejudice of the *Tailzie* to be null and void, and in that Case all posterior Alienations, even for onerous Causes will be reducible; tho no Inhibition be raised thereon: And because such Clauses prejudg Creditors and Commerce very much, and seem to be inconsistent with the Nature of Property and Dominion; Therefore an \* Act of Parliament was necessary for securing them: and generally in all these Cases the Contraveener pre-judges not only himself, but all the *Heirs* that might succeed by him, so that there is place for the next Substitute, who may in either of these Cases serve himself Heir to the Maker, (though generally a Man should be served Heir to him who was last

\* K. Ja. 7.  
Par. 1.  
Act 22.

Book III. infest) or he may serve himself Heir to the Contraveener who was last infest, without being obliged to fulfil his Deeds.

*Quarto*, If a Man oblige himself to *tailzie* his Lands, he is obliged once to *tailzie*, but not to continue the *Tailzie*; but if the Obligation be made for an onerous Cause, the same is not revokable, as if the *Tailzie* be mutual.

*Quinto*, Where *Tailzies* are made to two Strangers jointly and their Heirs, they succeed to equal halves, and they are both Fiar: But if Lands be taken to a Man and his Wife in Conjunct-fie and Life-rent, and their Heirs, the Husband is Fiar, and the Wife's Conjunct-fie resolves only in a Life-rent; and yet in Substitutions to Moveables, both their Heirs would succeed equally.

*Sexto*, In Conjunct-fies these general Rules hold, that the Husband is Fiar, because of the Prerogative of the *Sex*; and that he is Fiar on whom the last Termination falls: yet both these Rules hold only *presumptive*, and may be over-ballanced with stronger Presumptions; as for instance, if the reversion of Lands belonging to the Wife as Heretrix be taken to the Husband and Wife, and their Heirs, the Wife's Heirs would exclude the Husband's Heirs;

\*



Heirs ; for it is presumable that the Rever-  
 sion should follow the Heritable Right ; Or  
 if a Father should take Security in Lands  
 to himself, his Son, and their Heirs, the Fa-  
 ther would remain Fiar, which does like-  
 wise hold, though the Security were taken  
 to the Father and Son *nominatim*, and  
 the Son's Heirs, even though the Son were  
 infest ; for it is presumable, that the  
 taking Infestment was only designed to  
 compleat the Security and to substitute  
 the Son, but not to exclude the Father  
 from his own Fie : And generally in all  
 Substitutions, the chief thing to be consi-  
 dered, is the Design of the Parties.

*Heirs of Provision* are these who suc-  
 ceed by virtue of a particular Provision  
 in the Infestment, such as the Heirs of a  
 second Marriage : And as to these Heirs  
 of Marriages, we may observe two things,  
 First, That if a Father by his Contract of  
 Marriage be obliged to employ a Sum to  
 himself, and the Wife in Conjunct-fie,  
 and the Heirs of the Marriage, he cannot  
 in prejudice thereof do any *fraudulent*  
*gratuitous Deed*, though he may provide  
 a Jointure to a second Wife, or Provisions  
 for his Children of a second Marriage.

*Secundo*, Though a Father may assign  
 or dispoſe Sums to Children, when ex-

Book III.

tant, whereby they will be preferred to posterior *Creditors*, as becoming *Fiat* by the said Rights; yet if the Father dispoſe to Children to be procreate, this will be conſidered only as a Deſtination, and ſo will not hinder the Father to make poſterior Rights, or even poſterior *Creditors* to affect by Diligences what is ſo diſpoſed.

*Tertio*, *Proceſs* will be ſuſtained at the inſtance even of the appearand Heir of the Marriage againſt the Father, to fulfil the ſpecial *Obligations* therein, or to purge any Deeds already done by him in prejudice thereof.

Albeit, where Heirs are not ſpecially deſigned in any Right, the *Heirs of Line* exclude all other Heirs; yet if a Man take Lands to himſelf, and his *Heirs Male tailzie* or proviſion, and thereafter acquire Reverſions, or Tacks of the ſame Lands to himſelf and his Heirs; theſe Rights will accreſs to that ſpecial Heir to whom the Land was provided; for it is not preſumable that a Man would give the Lands to one, and the Rights of them to another Heir.

When Women ſucceed, all theſe of one Degree ſucceed equally; and becauſe the Eſtate is divided amongſt them, they  
are

are called *Heirs Portioners*, the Eldest Tit. VIII.  
 not secluding the rest, and having no  
 advantage over them : But where the *Heirs Por-*  
*Rights* are indivisible, such as *Titles, Ju-*  
*risdications, Superiorities*, and all the Ca-  
 sualties of these Superiorities, such as  
*Ward, Marriage, Non-entry, Feu-d-*  
*ties, &c.* these fall all to the Eldest *Heir*  
*Female* without division, together with  
 the principal Messuage, it being a Tower  
 or Fortalice ; for other Houses are divided  
 equally.

All these Heirs are liable for their Pre-  
 decessor's Debts, *in solidum*, if they once  
 enter Heir, except Heirs Portioners,  
 who are only liable *pro rata* ; and Heirs  
*substitute* in a Sum, who are only liable  
 to Creditors in the value of the Sum to  
 which they are substitute. But they have  
 in *SCOTLAND* a Privilege which they  
 call the *Benefit of Discussion*, whereby Benefit of Discussion.  
 the Heirs of Line must be first pursued to  
 fulfil the *Defunct's Deeds*, or pay his  
 Debts : And next to these, the *Heir of*  
*Conquest*, the *Heirs Male*, the *Heir of*  
*Tailzie*, and *Heirs of Provision*. But for  
 fulfilling a Deed relating to particular  
 Lands, the Heir who succeeds in these  
 particular Lands must be first pursued  
 without *discussing* ; and that which is  
 meant

Book III. meant by *Discussing*, is, that the *Creditor* must proceed by *Horning*, *Caption*, and *Apprising* or *Adjudication* against the *Heir*; who is to be *discussed* before he can reach the other *Heirs*.

Heir  
active.

An *Heir* is said with us to be *Heir active*, who is served *Heir*, and may pursue; whereas he whom the *Law* makes

Heir pas-  
sive.

liable to be *Heir*, is said to be *Heir passive*: As when the *appearand Heir* is *insest* upon a Precept of *Clare Constat* by the *Superiour*, or otherwise meddles with his *Father's Estate*.

Appea-  
rand Heir.

When the *Predecessor* dies, he who should be *Heir*, (and therefore is called *appearand Heir*) has Year and Day allowed him to deliberate whether he will be *Heir*; which is called *Annus delibrandi*\*; and which is indulged by the *Law*, because if a Man enter once *Heir*, he is liable to all the Debts though far exceeding the *Estate*; and within that Year he cannot be pursued, nor obliged to enter; but after the Year is expired, the *Creditor* may charge him to enter *Heir*; and if he resolve not to enter, he must renounce any *Right* he has by a *Writ* under his hand.

\* Annus  
delib.  
K. Ja. 6.  
Par. 23.  
Act 27.

Posthume  
Child.

This Year is computed from the *Defunct's* death, except in a *posthume Child*, who

who has a Year allowed him after his Birth, and not only during this Year, but after it expires, the *appearand Heir* without instructing any Title, may pursue for *Exhibition of all Rights made to his Predecessors*, and of all Rights made by his *Predecessors* to any in his own *Family*, (but not to *Strangers*) to the end he may deliberate whether he will enter *Heir*: the *appearand Heir* may also defend his *Predecessor's* Right, and continue his Possession by pursuing for *Meals* and *Duties*, though he renounce. *Vid. supra Book 2. Tit. 9. §. Life-rents.*

If the *appearand Heir* resolves to enter *Heir to his Predecessor*, he must raise *Briefs* from the *Chancellery*; which *Brief* is a *Command from the King* to the *Judge ordinary* where the Lands lie, to cause try by an *Inquest*, consisting of 15 sworn Men, whether the *raiser of the Brief* be *nearest Heir*; and this is executed or proclaimed at the *Mercat-Cross* where the Lands lie; and if at the day appointed the *Inquest* find him to be the next Person who should succeed, they *serve him Heir*, by a Paper which is called a *Service*, and which being returned by them to the *Chancellery*, there is a *Writ* given to the *Heir*; and which is called the *Return*,

Book III. *tour*, because it is their Answer and Return to the *Chancellary of the Points* contained in the *Brief*; and thereafter, the Person who is served Heir is infest by Precepts out of the *Chancellary*; which Infestment must be given by the *Sheriff* or his *Deputes*, and the *Sheriff-Clerk as Notar* thereto: and if the Service was to any particular Lands, it is called a *special Service*; but if there was no Land designed, it is only called a *general Service*: and this general Service may be before any Judge, and is sufficient to establish a *Right to Heritable Bands, Dispositions, Reversions, Jurisdictions*, and all other Rights whereupon the *Defunct* was not infest, nor needed to be infest; and a *special Service* includes a *general Service*, but not *e contra*.

General  
Brief.

The *general Brief* hath only two *Points or Heads*, viz. if the *Defunct* died at the *King's Peace*, and if the raiser of the *Brief* be the next Heir; but the *special Brief* has seven, viz. when the *Defunct* died. *Secundo*, If he died last *vest* and *seised* at the *King's Peace*. *Tertio*, That the *Raiser* is next Heir. *Quarto*, Of whom the Lands are holden *in capite*. *Quinto*, By what manner of holding. *Sexto*, What is their *Old and New extent*. *Septimo*,

*Septimo*, Whether the *Raiser* be of lawful Age, and in whose hands the Lands are at present. Tit. VIII.

Sometimes likewise the *Vassal* without serving himself *Heir*, gets a *Precept of Seisin* from the *Superiour*; wherein because the *Superiour* declares, *That it is known to him that such a Man is Heir to his Father*, it is therefore called, a *Precept of Clare Constat*; which therefore makes the *Obtainer* liable *passive* to all his *Predecessor's Debts*, but gives him only *Right active* to the particular *Lands* contained in the *Precept*; nor will it give him a *Right* even as to these *Lands*, except against those who derive *Right* from the *Superiour* who gave it.

*Bailiffs* also of *Burghs Royal*, do *infeft* their *Burgesses* in *Burgage Lands* \*, by giving them *Seisin as Heirs*, and delivering them for a *Symbole* the *Hesp* and *Staple of the Doors*; and the *Seisin* in that *Case* is in place of a *Service*, as to these *Lands*; but is not in other *Cases* a sufficient *active Title*: and these *Seisins* must be given by the *Bailiffs* and the *Common Clerk* of the *Burgh* as *Notar*, otherwise they are null.

\* K. J. 5.  
Par. 1.  
Act 27.

The *Heir* who is *Retoured*, holds either his *Lands* of the *King*, and then he gets  
Precepts

Book III. *Precepts out of the Chancellery to the Judge Ordinary to infect him ; which if he refuse, the Lords upon a Supplication, will direct Precepts to any other Person, who is thereby made a Sheriff in that Part : but if the Lands hold of another Superiour, then either that Superiour is himself entred or not ; if he be entered, he will be charged by four Consecutive Precepts to enter the Heir ; and if at last he disobey, his immediate Superiour will be charged, and so till the Heir arrive at the King, who never refuses to enter any ; and if the Superiour be not entered, he must be charged upon forty Days to enter, that being himself entered, he may enter his Vassal ; and if he refuse or delay, he loses all the Non-entries of his Vassal during his Life ; but no other Casualties, because quoad these he was not culpable.*

Though the Person who should be Heir do not enter to his Predecessor's Heritage, yet he may be made liable to his Predecessor's Debt, by two passive Titles relating to Heritable Rights ; viz. *Gestionem pro herede*, and *as Successor titulo lucrativo post contractum debitum* ; and there is a third passive Title relating to Moveables, which is called *Vicious Intromission*.

*Behaving*



Behaving as Heir, or *Gestio pro Herede*, Tit. VIII. is when the Person who might have been *Heir* immixes himself, and intromits with either the *Moveable Heirship*, or any Heritable Estate belonging to the *Defunct*; in which Case, he is liable to the Creditors, not only according to the value of what he intromitted with, but as far, and in the same manner as if he had been entered *Heir*; and yet the Lords will not sustain this *passive Title*, because of its extraordinary hazard where the intromission is very small, or where he has colourable Title, to which he might ascribe his *intromission* as a *Factory* from the *Compriser*; or the *Donator* to the *Escheat* or *Recognition*, *Gestio pro Herede*, being *magis animi quam facti*; which *Factories* will defend though there was no *Declarator*: but if the *appearand Heir* had no *Factory*, it is not sufficient to alledge the *Defunct* died Rebel, and so could have no *Heir*, except his *Escheat* was declared before intenting the Pursuer's Action; nor will this *passive Title*, nor *vicious Intromission* be sustained beyond *simple Restitution*, except they be pursued in the *Intromitter's* own life-time, they being kinds of *Delicts*. But he will not be liable if the *Defunct's Right* was reduced, though after his intromission;

Behaving  
as Heir.

Book III. intromission; and since this *passive Title* was introduced by the *Lords of Session*, in favours of the *Creditors*, to deter *appearand Heirs* from *fraudulent Intromission*, therefore an *appearand Heir*, paying his Predecessor's Debt, will not infer this *passive Title*, since that is for the Advantage of *Creditors*; nor will the getting of Money for ratifying a *Comprising* that is expired, infer this *passive Title*, since the *Creditors* would have got no Advantage by that Right: but if the *appearand Heir* had consented before the *Comprising* was expired, it would be a *passive Title*, because as *Heir* he might have redeemed the *Comprising*; and if an *appearand Heir* grant Bond to a confident Person for his own behoof, and that confident Person *comprises* or *adjudges* the Heritage thereupon, his *Intromission* by virtue of that *Apprising* will not defend him \* against this *passive Title*, whether the Legal be expired or not; but he will be liable as if there were no such Right in his Person.

\* Act Se-  
derunt,  
28 Feb.  
1662.

Succes. tit.  
lact.

*Succesor titulo lucrativo*, is where the *appearand Heir*, to preclude the necessity of entering *Heir*, and so being liable to the *Creditors*, gets a *Disposition* from him to whom he would have been *Heir*, without any *Onerous Cause*; the receiving whereof;

whereof, though it be a small part of the Estate, makes him liable to the Payment of all the *Creditor's Debt*; if the Right made as well as the *Infestment* was posterior to the *Creditor's lawful Debt*. But if there be an *Onerous Cause*; then either it is not near equivalent to the value of the *Lands disposed*, and in that Case it will not defend against this *passive Title*: Or, if it be near to the *value*, it will defend against it, but not against *Restitution* of that *value*. And since this *passive Title* overtakes such as might have been Heirs; therefore a Disposition granted to a *Grand-child*, will make him *Succesor titulo lucrativo*, though the Father be alive, since by the *Course of Succession*, he might in time have been Heir, though he was not immediate Heir: but since this can only reach *appearand Heirs*; therefore a Disposition made by one Brother to another; though the Maker had no Children, will not make him *Succesor titulo lucrativo*, since the Brother might have had Heirs himself; and so his Brother was not his *appearand Heir*.

This *passive Title* holds only in Heritage, and therefore the getting a Right to moveable Heirship and Tacks, will not infer the same.

P

Gestio

Book III.



*Gestio pro Herede*, and *Successor titulo lucrativo*, being *passive Titles*, whereby in *odium* of the irregularity of the intromission they are made liable as Heirs; therefore these *passive Titles* can extend no further than if they intromit with, or take a *Disposition* to these things to which they might have succeeded, and so not inferred against an Heir of *Tailzie*, intromitting with, or getting a *Disposition* of what would have fallen to the Heir of Line; nor can they be extended further than if they had been served Heirs: And thus an Heir-portioner will be no further liable in these than *pro rata*, if she had entered; for the Copy should go no further than the Original.

\* Stat.  
Will. Reg.  
cap. 13.  
Rights on  
Death-  
bed.

To conclude the Succession in Heritage, it is fit to know, that by an *old Statute* \*, and our *constant practick*, a *Man cannot dispoſe his Heritage upon Death-bed in prejudice of his Heirs*; (that is to say, neither Lands, nor Heritable Bands, nor any Band though moveable, in so far as his Heritage may be thereupon *apprised* or *adjudged*, can be then disposed); so jealous was Our Law of the importunity of *Churchmen* and *Friends*, and of the weakness of Mankind under such Distempers: And therefore if

a

a Man has made any Right in prejudice of Tit.VIII. his *Heir*, after contracting Sickneſs, though he was ſound enough in his Judgment for the time, and continued ſound for a very long time; yet this Right will be reduced, as done *in lectio*, or upon *Death-bed*, either at the inſtance of the *appearand Heirs*, or at the inſtance of the *appearand Heirs Creditors*: and it is ſufficient to prove Sickneſs, though it be not proved *Mortal*, and that he was Sick; without proving that he died of that Sickneſs; or was Sick the very time of the Diſpoſition.

If thereafter the Maker of ſuch a Right come to *Kirk* or *Mercat unsupported*, the Law preſumes that the Maker was *reconvaleſced*, and ſo the Deeds *reconvaleſce* with him: But ſince the Law has fix'd upon *Kirk* and *Mercat*, as open Places; where the Diſponer may be ſeen by all Men, and by unſuſpect Witneſſes; *Equivalent Acts*, as going to make Viſits, though at a greater diſtance, will not be ſuſtained. But though a Man cannot grant a new Right upon *Death-bed*, yet he may perfect an old Right, or do a Deed to which he might have been otherwiſe compelled, as for Payment of his Debt, or may grant a rational Jointure

Book III. to his Wife, though he cannot grant Provisions to his Children in that Condition. And all Deeds done with the consent of his Heir are valid; because this Law is introduced in favours of Heirs, whether they be *Heirs of Line, Male, or Tailzie, or Provision.*


## T I T. IX.

*Of Succession in Moveables.*

**T**He same Rules are observed in the *Succession of Moveables*, that were formerly specified in the *Succession of Heritage*, except as to these particulars, viz. all of one Degree succeed equally: and so amongst *Brothers and Sisters*, the *Elder* exclude not the *Younger*, nor *Males* the *Females*, as in *Heritage*: and in *Moveables* there is no *Right of Representation* as in *Heritage*; and therefore if there be a *Brother* and two *Sisters* alive, and a third *Sister's Children*, the *Brothers* and *Sisters* who are living will succeed equally, excluding the *Children of the Sister* who is dead.

Testa-  
ments.

*A Testament or Latter Will*, does require to be in *Writ*, for *Nuncupative Testaments*

*staments* (which were so called in the *Civil Law*, because the *Defunct* named his *Heirs* without *Writ*) are not allowed by *Our Law*, by which a *Testament* must either be *Holograph*, all written with the *Defunct's* own hand; or at least subscribed by him before two *Witnesses*, if he can write; or if he cannot write, by a *Notar* or *Minister* and two *Witnesses*. Tit. IX. 

No *Heritable Right* can be left in *Testaments*, though the *Testator* was in *Leidge Poultie*, or perfect *Health*: and though the *Testament* be made in other *Nations*, where *Heritage* may be disposed by *Testament*; yet it will not transmit a *Right* to *Heritage* lying in *Scotland*; and yet a *Testament* made according to the *Solemnities* of these *Nations*, will be valid in *Scotland*; for though they may regulate us as to *Solemnities*, yet they cannot alter the *Nature*, and so not the transmission of our *Rights*.

*A Legacy is a Donation left by the Defunct in any Writ, to be payed by his Executor*: But if the *Legatar* die before the *Testator*, or before the *Condition* is fulfilled on which the *Legacy* was left, then the *Legacy* evanisheth; and though neither other *Mens Moveables*, nor a *Man's* own *Heritable Rights* can be left in *Legacy*. Legacy.

Book III. *gacy*, yet such *Legacies* are valid, if the *Testator* knew that the Sum left was Heritable, or belonged to others; and the *Executor* in those Cases must pay the value.

A *Minor* being above 14 Years, may make a *Testament*, without the consent of his *Curators*; but under 14 Years he can make none. A *Wife* may make a *Testament*, without the consent of her *Husband*. And a Person *interdicted*, without the consent of the *Interdictors*; but *Idiots* nor *furious Persons* can make none, except in their *lucid intervals*; nor *Bastards*, except they be *legitimated*, or have Children of their own.

Jus Re-  
lictæ.

Legitim.

If a Man be *married*, the *Wife* has without *Paction*, a share in his *Moveables*, of which he cannot defraud her by his *Testament*; and this is called *Jus Relictæ*: and if there be Children, the Law has provided a Portion of the *Moveables* for them, which is therefore called their *Legitim*, and of which their Father cannot prejudice them by his *Testament*, but there is no *Legitim* due by the *Mother's Death*; nor have Children who are *Foris Familiat*, that is to say, *who are married, and have renounced their Portion natural*, any *Legitim* due to them.

This *Legitim* is also due only to the  
 †  
 imme-



immediate Children, but not to *Grand-children*. Tit. IX.


The Remainder of the *Defunct's Moveables*, beside what is due to the Relict and Children, is called the *Dead's Part*; and upon that only he can dispo-  
Dead's part.

If a Man have no *Wife* nor *Bairns*, all is the *Dead's part*, and may be disposed by him: If there be either *Wife* or *Bairns*, and not both, then the *Defunct's Testament* receives a *Bipartite Division*; but if there be both *Wife* and *Bairns*, then it receives a *Tripartite Division*.

By the *Civil Law*, a *Testament* was null if the *Heir* was not named; but with us a *Testament is Valid* though the *Executor* be not named, who is the *Heir in Mobilibus*, and is called *Executor*, because he  
executes and performs the *Defunct's Will*. Executor.

By Our *Law*, Relicts and Children dying after their Husbands and Fathers, but before Confirmation of their *Testaments*, do transmit their interest in the *Defunct's Moveables* to their nearest of Kin, viz. the Children, their *Legitim* or *Bairns part*, and the Relict her share of the *Moveables*; the *Bairns* also, as nearest of Kin, have Right to the whole *Dead's part*, and the *Executor* not being nearest of Kin, must count to them therefore, retaining

Book III. only a Third of the *Defunct's part*; which is allowed to him for executing the *Testament* \*, (if he be *Executor Nominate*, for an *Executor Dative* gets no allowance) and if there be a Legacy left to the *Executor Nominate*, it is imputed in Payment of his Third; but the *Dead's part* whether failing to Children or to the other nearest of *Kin*, failing Children is not transmittted without *Confirmation*; for both the *Relict's part* and *Childrens Legitim* arise by the Death of the *Father* or *Husband*, and so needs no *Confirmation* or other *Constitution*: But the nearest of *Kin's Right* is by *Succession*, and consequently requires *Confirmation* for establishing it, without which it cannot be transmitted to their *Executors*; for as an *Heir in Heritage* must be entered otherwise, he cannot transmit his *Right*, so neither can an *Executor* without *Confirmation* transmit his *Right*; *Confirmation* being the only *Additio Hereditatis in mobilibus*: and as without *Confirmation* the nearest of *Kin* could not be liable Passive in Payment of the *Defunct's Debts*, so neither could he without it have *Right Active*. Children have *Right* to their *Legitim*, except they be secluded therefrom either by their own *Renunciation*, or by accepting

*a Provision* in full *Satisfaction* of all that Tit. IX.  
 they can crave as their Portion natural,   
 or *Bairn's* part of Gear: And in either  
 of these Cases they are *foris familiat*, and  
 out of the *Family*, and so have no share  
 with the *Bairns* remaining in the *Family*:  
 And therefore if Children get Bonds of  
 Provision from the *Father* in his *Leidge*  
*Pouftie*, they are not thereby excluded  
 from their *Legitim*: Nor are they oblig'd  
 to collate these Bonds of Provision, and to  
 impute them as a part of their Portion nat-  
 ural; but they have Right to them as  
*Meer Creditors*, and may likewise seek  
 their *Legitim*: But if these Bonds of Pro-  
 vision were made to them upon *Death-*  
*Bed*, they cannot seek both the Provisions  
 of these Bonds and their *Legitim*; for  
 the *Father* upon *Death-Bed* cannot pre-  
 judge the Relict, nor the rest of his Chil-  
 dren of their respective shares, and con-  
 sequently these Children who are so pro-  
 vided upon *Death-Bed*, must collate with  
 the Relict and rest of the Children \*: but \* K. J. 6.  
 the *Heir* has no share in the *Moveables*; Par. 22.  
 except he collate, (and be content that the Aft 17.  
 rest of the Children share equally with him, Collation.  
 in all that he can succeed to as *Heir*;) or in  
 case there be but one *Child*; for then that  
*Child* is both *Heir* and *Executor* without  
*Collation*. An

Book III. An *Executor Nominated*, is he who is  
 ~~~~~ named by the *Defunct* in his *Testament*,  
 Exec. No- and is therefore likewise called an *Execu-*  
 minate. *tor Testamentar*; but if there be none  
 named by the *Defunct*, then the *Commis-*  
*sar* will make an *Executor Dative*; and  
 ordinarily they prefer the nearest of *Kin*:  
 but if the nearest of *Kin* being charged,  
 will not *Confirm*, then they name their  
 own *Procurator-Fiscal Executor*; and if  
 thereafter the nearest of *Kin* compear, they  
 use to *Surrogate him*, and this is called an  
*Executor-Surrogate*.

A *Creditor* may confirm himself *Exe-*  
 Executor- *cutor-Creditor*, and so may pursue the *De-*  
 Creditor. *funct's Debtors*; and lest that *Creditors*  
 should wrong one another by *Nimious Di-*  
*ligence*, Our *Law* has appointed that all  
 who shall confirm themselves *Executors-*  
*Creditors*, or shall do *Diligence* against  
 Aft of Sed. *Executors* or *Intromitters* \* within six  
 28 Feb. Months one of another, shall come in *Pari*  
 1662. *Passu*.

*Executors-Creditors* are only obliged to  
 confirm as much as may pay themselves;  
 and are for the same reason only liable to do  
*Diligence for what they did confirm*.

Because *Moveables* may be easily con-  
 cealed from *Creditors*, or dissipated; there-  
 fore the *Law* appoints, that the *Executor*  
 shall

shall upon Oath give up Inventar, and find Tit. IX,  
 Caution to make these Moveables forth-  
 coming, and then the Commissar confirms  
 him; nor can he pursue, or dispoſe as  
 Executor, till he be confirmed: he is only  
 liable for the Defunct's Debt, in as far as  
 the Goods confirmed will extend.

Executory being a meer Office, it ac-  
 cresses to the Survivers; if there be moe  
 Executors, and in so far as the Executors  
 have not execute the Testament in their  
 own Life-time, that is to say, have not  
 obtained Decrets for the Goods belonging  
 to the Defunct, there will be Place for a  
 new Executor, for executing these, and  
 they are called, *Executors quoad non exe-*  
*cuta*: or if the Executor omit to give up  
 any thing in the Inventar, or do not give  
 up the saids Moveables at the full Rates,  
 there will be another Executor-Dative  
 appointed by the Commissars, who is cal-  
 led an *Executor Dative ad omiſſa vel*  
*male appretiata*.

The Executor only has Power of Ad-  
 ministration; and the Creditors and Lega-  
 tars can only pursue him, except where  
 there is a *Special Legacy left of such a* Special  
*particular thing*, or a Sum owing by such Legacy.  
*a particular Person*: For then the special  
 Legatar has the *Dominium* transmitted to  
 him,

Book III. him, and so he may himself pursue for his special *Legacy*; but the *Executor* must be still called in the pursuit, to the end it may be known, *whether the Debts exhaust the special Legacies*: For, no *Legacy* can be payed, till the *Debts* be payed; and therefore, if all the *Legacies* cannot be payed, the *Legatar* suffers a *Proportional Defalcation for Payment thereof*; but if there be as much *Free Goods* as will pay the special *Legacy*, there will be no *Defalcation*.

An *Executor* cannot dispoſe till he obtain a *Sentence*, but even the *Sentence* ſtates him not in the *absolute Right of the Moveables*, otherwiſe than that he may *diſcharge* and *assign* to the *reſpective Perſons* having intereſt: For, if he were *denounced Rebel*, the *Executory Goods* even after *Sentence*, would not fall under his *Eſcheat*, nor would his *Executors*, or his *Creditors* have Right thereto, in prejudice of the neareſt of *Kin* of the *Deſunct*, to whom he was *Executor*.

Co-Execu-  
tors.

If there be moe *Executors*, whom we call *Co-Executors*; one cannot purſue without the reſt, *for all of them repreſent the Deſunct* only as one Perſon; but if any of the reſt will not *concur*, they may be *excluded from their Office*, by a *Proceſs* before

before the *Commissars*; nor can an *Exe-* Tit. IX.  
*cutor* for the same reason *discharge a*  
*Debt* wholly, since the rest have an equal  
share in each *Debt*: but if the other *Exe-*  
*cutors* have got as much as their *share*  
will extend to, a *Discharge* even from  
one of the *Executors* will be sufficient:  
nor are (for the same reason) *Co-Execu-*  
*tors* liable for the *whole Debt*, and so can-  
not be *singly pursued*, unless they have  
*intrornitted* with as much as may pay the  
*Debt* pursued for.

An *Executor* is liable to do Diligence Diligence  
for recovering the *Debts* due to the *De-* of Execu-  
*funct*, and the Diligence required upon tors:  
his part, is a *Sentence*, and *registrated*  
*Horning against the Defunct's Debtors*;  
but if there be an Universal or Special  
*Legatar*, whereby the *Executor confirmed*  
has no Advantage, then the *Executor* is  
not liable in Diligence, but only to *assign*  
the *Creditors* that they themselves may  
pursue.

The *Executor* likewise cannot pay any  
*Debt* without *Sentence*, lest otherwise he  
might *prefer one Creditor to another*; but  
yet the *Executor* may pay those *Debts*  
that are acknowledged in *Testament* with-  
out *Process*, providing the same be payed  
before the *Creditors intent a pursuit*: but  
these

Book III. these which we call *Privileged Debts*, may be payed at any time even after *Privileged Process* is intented at the instance of other *Debts*. *Creditors*; because they are preferred to all others, viz. *Servants Fies, Medicaments on Death-Bed, House-meal, and Funeral-expences.*

After the *Executors* have executed the whole *Testament*, they may get a *Decreet of Exoneration* before the *Commissars* against the *Creditors*, and all having Interest; wherein they may prove that all they got is *exhausted by Lawful Sentences*; but it is not necessary to have such a *Decreet* when they are pursued before the *Lords*, for it is sufficient when they are pursued there, to alledg, *that they are exhausted by way of Exception.*

If any Person intromit with the *Defunct's* Moveables without being confirmed, they are liable to the *Defunct's* whole *Debts*, whether they were related to him or no, though their Intromission was very small; and this was introduced to prevent the *fraudulent and clandestine abstracting of the Defunct's Moveables, without Inventory, in prejudice of Creditors*: and therefore this Passive Title is only introduced in favours of *Creditors*, but of none others, such as *Legatars* *Bairns*,

Decreet of  
Exonera-  
tion.

Vicious In-  
tromif-  
sion.



*Bairns, &c.* But if the Intromitter confirm before any Action be intended, this purges the *Vicious Intromission*, and the Intromitter is only liable for the *value of the Goods intromitted with*; or if there be an *Executor confirmed*, no Person can be pursued as *Vicious Intromitter*; for the Intromitter then is only liable to the *Executor*: But the *Relict*, or the *Defunct's Children*, confirming within Year and Day after the *Defunct's* Death, do thereby purge the Vitiosity, though they confirm not till after Citation; nor will necessary Intromission infer Vitiosity: and that is called *necessary Intromission*, when either the *Husband* or the *Wife* continue their Possession of one another's Goods after one another's Decease for preservation; and that because there is no other Person to look after them; and this is for the *advantage of the Creditors*, since it hinders the Goods from perishing.

If there be more *vicious Intromitters*, they are each liable *in solidum*, if they be pursued in several *Actions*; and *pro virili*, if they be pursued together; but none of them get *Relief*, for *wrong in our Law has no Warrant*.

The *Heir* is obliged to relieve the *Relief, &c.*  
*Executor* of all Heritable Debts, and  
 the

Book III. the *Executor* is bound to relieve the  
 Heir of all Moveable Debts, as far as  
 the *Inventar* will reach.

## T I T. X.

*Of last Heirs and Bastards.*

Ultimus  
 Hæres.

**W**Hilst there is any alive who can  
 prove even the remotest *Contingency* of Blood to the *Defunct*, they succeed to him; but if there be none, the *King* succeeds as last Heir; for *quod nullius est, est Domini Regis*; and so the *King* succeeds to the *Defunct* as last Heir; both in *Heritage* and *Moveables*, and is preferred to all *Superiours* and others whatsoever; for which end he makes a *Donatar*, who must obtain a *Declarator* before the *Lords of Session*, against all who are supposed to have any *Relation*: whereupon a *Decreet* being obtained before the *Lords*, declaring that the *King* has Right as last Heir, the *Defunct* having died without any *Relation*, this *Decreet* is equivalent to a *Service*; but if *Lands* be taken by a Man to himself, and his *Heirs Male* simply, the *King* or other *Superiour* will succeed as last Heir, if there

there be no *Heirs Male*, though there be *Heirs Female*, since the Land was not provided to them; and therefore Men ordinarily in their *Tailzies* adject the Clause which failzing to their *Heirs whatsoever*. Tit. X.

Because the *King* succeeds here as Heir, therefore he is liable to pay the Defunct's Debts; but he is only liable as far as the Estate will extend; and therefore the *Creditors* may adjudge the Real Estate, and serve themselves *Executors-Creditors* in the *Moveables*.

A *Bastard* by Our *Law*, has neither *Bastardy*: *Heirs* nor *Executors*; but yet he may dispone upon either his *Heritage* or *Moveables* in his *Leige Poustie* though he cannot make a *Testament*, except he be legitimated by a Letter under the *Great Seal*, (which extends not to *Heritage*) or have Children surviving him; for the *Bastard's* Children will always seclude the *King*.

The *King* in the Case of *Bastardy*, makes a *Donator*, who pursues Declarator, and is liable to the Debt; for in effect the *King* succeeds here, *quasi ultimus heres*, and *Creditors* use the same Execution in this Case, as in the other: and in both *ultimus heres* and

Q

*Bastardy*;

Book III. *Bastardy*, the Relict has still her share of  
 the *Moveables*, as in other Cases.

Children procreated betwixt Persons  
 divorced, and these with whom they  
 have committed *Adultery*, cannot succeed  
 to them \*.

\* K. Ja. 6.

Par. 16.

Act 20.

THE

THE  
INSTITUTIONS  
Of the LAW of  
SCOTLAND.

BOOK IV.

TITLE I.

*Of Actions.*

**H**AVING finished these two first Parts of the *Law*, which treat of *Persons and Rights* : We come now to treat of the *Third Part*, viz. *Actions*, whereby these *Persons* pursue those *Rights*. Actions.

An *Action* is defined to be a *Right of* Defn. of  
*prosecuting in Judgment what is due to us* : *Actions*.

Q 2

And

Book IV.

Real and  
Personal  
Actions.

And it suffers very many Divisions; the first whereof is, that some are Real, and some Personal: *A Personal Action*, is that whereby we only can pursue the Person that is obliged to us; as where I pursue a Man for Payment of a Sum due by his Bond. *A Real Action*, is that whereby a Man pursues his Right against all singular Successors, as well as the Person who was first obliged: As for instance, if one have an *Infeſtment of Annual Rent*, he cannot only pursue the *Granter* for Payment of the Money by a *Personal Action*, but he can by a *Real Action*, called an *Action for Poynding of the Ground*, pursue all singular Successors, and poynd the Tenants and Intromittors with the Rent, for recovering of his Annual Rent out of the Land that stood affected with his *Infeſtment of Annual Rent*. But by the Civil Law, a Personal Action is said to be that which arises from a *Personal Obligation*, as a Real Action is that which arises from a *Real Right*, and is founded in *Dominium or Property*, and competent against any Possessor or Detainer of what is ours, called likewise *rei vindicatio*.

*Actions* are also divided in ordinary Actions, and Actions recissory: For with us all Actions are called ordinary Actions; except

except Improbations, whereby we pursue *Tit. I.*  
*Papers to be declared False and Forged;*  
 or Reductions, whereby we pursue Rights to  
 be declared null, and to be reduced.

Improbation and Reduction,  
 Terms of Improbation.

In Improbations there are two Terms given to produce the Writ, because the danger is great: And if the Writer and Witnesses of and in that Writ be alive, *their Testimonies are only allowed as Probation*; which is called the *direct manner of Improbations*; But if these be dead, the Lords try the Verity of the Writ by *strong Presumptions and Conjectures*, which is called the *indirect manner of Improbation*: But because in Reductions the Writ called for, is only to be declared null till it be produced; therefore in these there is only one term granted for producing.

Direct manner of Improbation.  
 Indirect manner of Improbation.

No Certification will be granted against any Writs made by the Pursuer and his Predecessors and Authors, except he be served Heir to these Predecessors, and produce a Right made by these Authors: But Certification will be granted against any Rights made to the Defenders or their Predecessors, to whom they may succeed *jure sanguinis*, or to their Authors, or to any to whom these Authors may succeed *jure sanguinis*; if any Person be called to represent these Authors.

Certification in Improbation.

Book IV.

The ordinary *Reductions* are *ex capite Inhibitionis*, Whereby we pursue Rights to be declared null as granted after *Inhibition* is raised by us; or *ex capite interdictionis*, if granted after *Interdiction* is raised by us; or *ex capite viris & metus*, if the Rights were extorted from us by force; or *ex capite fraudis*, if the Right were elicited from us by *Circumvention*, in both which last the Pursuer must libel the *Qualifications* or *Circumstances* from which the Force or Fraud are inferred; or *ex capite lecti*, if the Deeds were done upon Death-bed, in prejudice of an appearand Heir; or upon the *Act of Parliament* 1621 \*, if the Deeds were done in prejudice of prior lawful Creditors, in favours of conjunct or confident Persons; that is to say, *Relations* or *Trustees*, without an *onerous Cause*; or to a Creditor though for an *onerous Cause*, in prejudice of another who had done prior Diligence, that was habile to affect the Subject disposed: all which, and many others of that Nature, are opposed to ordinary Actions; because they are extraordinary Remedies invented by Law for the preservation of Mens Rights, and are called extraordinary, because they are never competent, till other ordinary Remedies fail.

\* K. J. 6.  
Par. 23.  
Act 18.

\*


Actions



Actions of *Reprobation* and *Error* Tit. I. are in effect *Reductions*, and must have the concurrence of the *King's Advocate*: In the first whereof, a Party against whom Witnesses have deposed unjustly, craves the Decreet pronounced upon these Depositions to be reduced, because the Witnesses have deposed falsely, *circa initialia testimoniorum*; and condescends in his *Reasons of Reduction* upon the particulars wherein they have deposed falsely; and also concludes, that the Testimonies should be reprobated.

In the *Summons of Error*, the Pursuer Summons craves that a Service (whereby the Defender is served Heir to such a Man) ought to be reduced; because the Pursuer is a nearer Relation to the Defunct than the Person wrongously served, upon which he condescends; and therefore concludes, that the Service and all following thereupon may be reduced; and that it may be found that the Inquest who served him Heir have erred: and this is the only Summons that is drawn in *Latin* with us.

Some Actions are called *Preparatory* Actions or *Prejudicial* Actions, because they must be discussed before other Actions are competent; As for instance, If I pursue for a Sum, and the Defender raises an Improbation,

Book IV.  bation, alledging the Writ to be false, the tryal of the Fallhood must be first discussed, and so is prejudicial to the *Action of Payment*.

Exhibi-  
tions.

*Exhibitions* conclude either meetly to exhibit the Writ, or the thing called for; and then it is only a *Preparatory Action*, such as *Exhibitions ad deliberandum*; or else they conclude Delivery: and in all *Exhibitions* the ordinar terms libelled, are that the *Defender had, has, or has fraudfully put away the Papers or Things craved to be exhibited*; and therefore he is not obliged to exhibit, except he had them since the Citation, or fraudfully put them away, to elude a *future Citation*.

Actiones  
bonæ fi-  
dei.

Some Actions are called *Actiones bonæ fidei*, in which Equity is followed, as *Actions upon Mandates, Depositions, Empison, Location, &c.* In which the Judg considers what in Equity is to be done by one Party to another. And some Actions are *stricti juris*, in which the Judg is to follow the strict Prescript of the *Contract* upon which the Action is raised, as in a *Declarator of Redemption*, wherein the *Pursuer craves, that it may be declared that he has lawfully redeemed the Lands that were wadsetted*; in which Case, the Judg must consider the very precise

Actiones  
stricti Ju-  
ris.

precise terms of Reversion, and that the Tit. I.  
Lands were redeemed conform to these  
terms; nor is Equipollency relevant in  
these Cases.

Some Actions are called *Rei persecuto-* *Rei perse-*  
*ria*, by which we pursue that *quod patri-* *curatorie.*  
*monio nostro abest*; which is commonly  
called *Damage and Interest*.

Some are called *Penal Actions*, because *Penal.*  
*we pursue not only for Repetition and real*  
*Damage, but for extraordinary Dama-*  
*ges, and Reparation by way of Penalty;*  
*such as are Spulzies, Actions for violent*  
*Profits, &c.*

Some Actions are called *Arbitrary* *Arbitrary.*  
*Actions, wherein the Judg is tied to no*  
*particular Law, but proceeds ex nobili*  
*officio*; that is to say, according to what  
he sees justly and fit; as an Action for  
proving of the Tenor of an Evident,  
wherein the Complainer libels, that he  
had such a Paper, (of which he must  
libel the *full tenor verbatim*) and that he  
lost it by such an Accident; and therefore  
concludes, that the tenor may be proven  
by Witnesses, and Adminicles in Writ,  
which he must libel; for no Tenor can  
be proven without some Adminicles in  
Writ: And generally, there being many  
things with which the Law behooved to  
trust

Book IV. trust the Discretion and Honesty of the  
 ~~~~~  
 Judg, since all Cases could not be comprehended under known Laws; it therefore invested the Judg with this eminent Power, which is called *nobile officium*, in opposition to that *officium ordinarium*, & *mercenarium*; wherein he is obliged to follow the *Will of the Contractors* precisely: & *hoc officium mercenarium Judex nunquam impetit nisi rogatus*.


Declarators.

Some Actions are called *Declarators*, because the Pursuer concludes in them that some special thing should be declared in his Favours; and ordinarily where-ever the *King*, or any other *Superiour* grants a Gift, he to whom it is granted pursues a *Declarator*, *craving, it may be found and declared, that the Casualty gifted to him has fallen in the Superiour's hands, and that he has Right thereto by virtue of the Gift*: And thus *Declarators* must be raised upon *Escheats*, *Marriages*, *Non-entries*, &c. only there needs no *Declarator* upon a Gift of Ward and of Forefaulture when past in *Parliament*; but if the Forefaulture be past before the Justices, the Gift must be declared. And on Gifts of *Escheat* they sometimes raise Actions both of general and special *Declarator* in one Summons. In the general, the Pursuer

fuier concludes, that it should be found and declared that the *Rebel was lawfully denounced to the Horn*; and that thereby his Escheat fell in the *Superiour's* hands: And in the special, he concludes, *that the Tenants of the Rebels Lands, whose Escheat is fallen, may pay him the Meals and Duties by virtue of his Gift, and Decree of general Declarator*. But though this last Action be called an *Action of special Declarator*, it is in effect but an *Action of Meals and Duties*. In other Cases also, where any thing is craved to be found and declared as a Right arising upon a special Matter of Fact, for which no other Action can be found that has a special Name: *Lawyers* do now cause raise *Actions of Declarator*, or at least cause adject Conclusions of Declarator to other Actions, such as *Reductions*, &c. and these are the same with the *Actiones in factum*, mentioned in the *Civil Law*.

Some Actions are called *Civil, where- Civil*  
*in Men prosecute their Civil Rights*; *Actions.*  
 and some *Criminal, wherein Men prosecute Crimes, ad vindictam publicam.*

For farther clearing of Actions, and how they ought to be libelled; I shall shortly

Book IV. shortly explain the *Nature of a Sum-*  
 *mons*, and shall set down some of those  
 Nature of Actions which have special Names and  
 a Sum- Conclusions.  
 mons.

The chief Parts of a Summons are the Pursuers Interest or Title ; that is to say, *the Right standing in his Person*, whereby he has good Interest to pursue the Action he has intented.

*Secundo*, That all the Persons who should be called as *Defenders*, be called in the Summons ; and since it is a relevant Exception against a Summons, that *all Persons having Interest are not called* : Therefore it follows clearly, that for the more Security it is fit to call all Persons who may be concerned in that Process.

Medium  
conclu-  
dendi.

*Tertio*, The *medium concludendi* ; that is to say, *the Ground whereupon the Persons called are liable to pay and perform what is craved*.

Will of  
the Sum-  
mons.

*Quarto*, After all this is narrated, the King in the Summons says, *Our will is, &c.* that ye *cite such and such Persons, &c.* which is called *the Will of the Summons*, and which Will of the Summons does comprehend a Command to the *Messenger* to cite the *Defenders* ; and expresses the number of Days, upon which they  
 are

are to be cited, and the Places to which they are to be cited, and before whom they should compare: *As also the Conclusion* craved by the Pursuer, each of which Summons almost has its own special *Stile* and *Terms*; and by Act of Parliament *Writers* are commanded not to alter the *Ancient Stile* \*.

Tit. I.

Conclu-  
sion.

\* K. J. 6.

Par. 10.

Act 13.

It is observable, that though the *Matter of Fact* be ordinarily narrated before the Will of the Summons; yet *Summonses of Reduction, Improbation, Spulzie,* and *Declarators of Nonentry*, begin at *Our Will is*, &c. and then go on to the Interest of the Pursuer, &c.

In a *Summons of Transumpt*, the Pursuer (who in the Summons is always called the *Complainer*) libels, *that he has Right to the Lands whereof he craves the Papers to be transumed*; and that therefore it is necessary to him to have *Doubles*, and *Transumps* of the Rights; and this is the Pursuer's *Interest*; and that the *Defender* has these Rights, or is obliged to procure him *Transumps*: and therefore concludes, that the *Defender* should be obliged to exhibit and produce them, to be judicially transumed; and the authentic *Transumps* to be declared as sufficient for the Security of the Pursuer

in

Book IV. *in the saids Lands, as the original Writts themselves.*

Multiple Poynding. In a *Summons of Multiple Poynding*, the Complainer having narrated that he is *troubled by such and such Persons*, who do each of them pretend Right to a Sum in which he is liable; he therefore concludes against all of them, to *compare* to hear and see the same tryed; and the Party who shall be found to have best Right to be preferred, and the other Party to be discharged from troubling and molesting him in all time coming.

• In a *Summons of transferring*, the Pursuer libels that there was a depending Process, at the instance of his Predecessor, whom he represents against the Defunct; whom the Debitor represents; which Process must be narrated *verbatim*: And if the Pursuer's Predecessor be dead, craves that the Process be transferred *Active* in his Person, as representing the Defunct. And when the Defender is dead, the same is transferred against his Representatives *Passive*. The Conclusion of Transferrances are, that such *Actions* may be competent to the Pursuer as Heir to the Defunct; against the Representatives of the Defender, as was competent to the Pursuer's Predecessor; and that the said Action may



go on and be continued in the same manner as it would have done against the Defunct, whom the Defender represents. Tit. I.

Transferences are privileged Actions coming in upon six Days.

If any Person Subscriber of a Bond or a Contract be dead, the *Procuratory* consenting to the Registration expires; and therefore the Writ cannot be registered, otherwise than by raising a Summons of Registration against the Representatives of the Granter, upon the Passive Titles, in which the whole Tenor of the Writ craved to be registered is set down *verbatim*; and then it is concluded, that the said Writ should *be insert* and registered in the Books of Council and Session for Conservation; and that Execution should be direct thereupon, in manner mentioned in the said Writ; and that the said Representatives should be liable in Payment: but this Action is ordinarily supplied by an ordinary Action for Payment.

Summons  
of Regi-  
stration.

In a *Summons of Prevento*, the Complainer narrates, that he having raised *Letters of Horning*, the same were suspended upon most frivolous Reasons, to a very long day; and therefore concludes, that the Defender should bring with him the said Suspension, the blank day of blank;  
prevento

Book IV. *prævento termino*, to hear and see the  
 same called, reasoned and discussed; with  
*Prævento*. Certification that if he fail, the Lords  
 will cause call the Suspension upon a Copy,  
 and admit Protestation therein, and ordain  
 the Letters to be put in farther execution.


If an *Advocation* be raised to too long  
 a Day of compearance, there may be  
 likewise a *Summons of Prævento* raised  
 thereof.

Contrav.  
 of Labor-  
 rows.

In a *Summons of Contravention of La-  
 borrows*, the Pursuer libels, that *A. B.*  
*became Surety and Laborrows for C. D.*  
 that the Complainers *Wife, Bairns, Men,*  
*Tenants, and Servants*, should be harm-  
 less and skaithless in their Bodies and  
*Lands, &c.* And then subsumes upon the  
 prejudice done, notwithstanding of the  
 said Caution: And therefore concludes;  
 that both the *Principal and Cautioner*  
 should be decerned to have contravened  
 the said *Act of Caution*, in manner fore-  
 said; and therethrough that they conjunctly  
 and severally have incurred the foresaid  
 Pain, the one half to the King and his The-  
 saurer, and the other half to the Complainer  
 as Party grieved\*.

\* K. Ja. 6.  
 Par. 6.  
 Act 77.  
 Par. 13.  
 Act 170.  
 Par. 7.  
 Act 117.

In a *Declarator of Property*, the Com-  
 plainer narrates his Right to the Lands,  
 and how long and after what manner he  
 and

and his Authors have been by themselves, Tit. I.  
 their Tenants, and others having Right   
 from them, in the peaceable possession of  
 the saids Lands, until of late that he is Declar. of  
 molested and troubled by the Defender; Property.  
 and therefore concludes that it should be  
 found and declared, that he has the sole  
 Good, and undoubted Right and Inte-  
 rest in and to the saids Lands; and that  
 therefore the said Defender and his Te-  
 nants, and Servants and others, of their  
 causing and commanding, should be de-  
 cerned not to trouble nor molest them for  
 the future, in their peaceable Possession,  
 bruiking, and joyning thereof.

If the Complainer designs only to  
 maintain his Possession, without bringing  
 his Property in Controversy, he raises a  
*Summons of Molestation*: In which he Summons  
 only concludes, that *they should desist, and* of Mole-  
*cease from troubling and molesting him in* station.  
*the peaceable Possession of his Lands.*

In a *Summons for Poynding the Ground*, Poynding  
 the Pursuer narrates, that he stands infest, of the  
 and seased in an Annual Rent of to Ground.  
 be uplifted, out of the Lands of  
 and therefore concludes against the Te-  
 nants of these Lands; and the Heritor  
 for his Interest, to *hear and see Letters*  
*directed to Messengers at Arms, Sheriff in*  
R that

Book IV. *that Part, to Fence, Arrest, Apprise, Compel, Poynd, and Distrinzie the readiest Goods and Gear that are presently upon the Lands, and yearly and termly in time coming, during the not Redemption of the Annual Rent.*

Spulzie.

In a Summons of Spulzie, the King commands Messengers, &c. (which is the stile of all Summonses) which begin with *Our Will* is, to *Summon, Warn, and Charge* the Defender, to compare and answer at the instance of the Pursuer, against whom the Spulzie after specified was committed; that is to say, the Defenders for their *Wrongs, Violent, and Masterful coming by themselves and their Servants, Complices, and others, in their Name; of their causing, sending, bounding out, command, raset, assistance and rati-habition to the Lands of* upon the day of *and for their Wrongs, Violent, and Masterful Spoilziation of the Goods (to be condescended on) and then concludes, that they should pay the Prices extending to* and the Profits that the Complainer might have made of the saids Goods daily since the said Spulziation, extending to &c.

Waken-  
ing.

In a Summons of Wakening, the Complainer after narrating that he had raised such

such a Summons, which he had suffered Tit. I. to lie over and sleep for a Year, (for there needs no *Wakening* if there was any *Judicial Act*, or Minute upon the Summons within the Year) and therefore concludes against all the Persons cited in the first Summons, to hear and see the *foresaid Action called, wakened, and begun, where it last left, insisted into, and Justice administrated therein, till the final decision of the Cause.*

A *Furthcoming* is that Action, wherein Furth- the Arrestor libels, that he having raised coming: *Letters of Arrestment*, he caused *Messenger* lawfully sence and arrest all Debts owing by the *Defender* to his Debtor, to remain under Arrestment, and to be made furthcoming to him; and therefore concludes, that the *Defender* should be *decerned to make furthcoming Payment, and delivery to the said Complainer, of the Sum of* *adebted, rest and, owand by him to the said Debtor.*

If notwithstanding of the *Arrestment*, the Debtor pay his own Creditor; he will be liable to the Arrestor, and will be forced to pay him what he was resting to his own Creditor, and likewise he may be pursued *for breaking of Arrestment*, wherein after the Arrestment and Breaking of Arrestment.

R 2

Payment

Book IV. Payment is narrated, the Pursuer concludes, *that the Defender should be discerned to have broken the Arrestment then standing, and not lawfully and duely loosed; and therefore to be punished in his Person and Goods, conform to the Laws of the Realm, in example of others\**.

\* K. J. 6.  
Par. 7.  
Act 118.

Accumulation of  
Actions.

Though the *Accumulation of several Actions into one Libel*, was not allowed by the *Civil Law*, yet it is allowed by Ours; in which we may not only pursue several Persons for several Debts in one Libel, which we call by a general name, *an Action against Debtors*, but we may likewise accumulate several Conclusions against one and the same Person, though they be of different Natures; as Reductions, Improbations, and Declarators of Property, and Actions of General and Special Declarator; in all which, it is a general Rule, *quot articuli tot libelli*.

But when many Actions are competent for one and the same thing, as if a Messenger be deforced, we may pursue the Deforcer criminally, (which will infer *Confiscation of Moveables*) or civilly, for *payment of our Debt*; and the pursuing of the one does not extinguish, or consume the other; and either the Criminal or Civil Action may be first pursued, and

and in the concurrence of all Actions, if Tit. II. the Actions which concur have different Conclusions, as in the foresaid instance where the Criminal Action of Deforcement concludes Confiscation, and the Civil Action only Payment. Though the Defender be assolvied in the Criminal Process, yet he may be pursued Civilly, and the Deforcement referred to his Oath.

Concursus  
actionum.  
Deforce-  
ment.

## T I T. II.

*Of Probation.*

FOR understanding the *Matter of Probation*, it is fit to know, that all *Probation* is either by Writ, by Oath, or by Witnesses.

*Probation by Writ*, has been formerly explained in the Title concerning *Obligations by Writ*.

*Probation by Oath*, is when either the Party or Judge refers any thing to the Oath of the contrarie Party; but regularly, no Man's Right can be taken away by Oath, except he who has the Right refer the same to the Adversary's Oath: but when there is a former Probation already addu-

Book IV. ced, the Judg sometimes gives an *Oath of Supplement*; which is so called, because it is given to *supply the Probation* already led, when it is defective or unclear.

*Oath of Supplement.*

*Oath of Calumny.*

An *Oath of Calumny*, is that whereby either the Pursuer or Defender is obliged to swear that the *Pursuit, Defence, Reply, &c.* are not *groundless* and unjust: and this may be craved by either Party at any time during the Dependence; and if it be refused, the Pursuer will have no further Action, nor the Defender will not be allowed to *insist any further in the Defence, Duply, &c.* whereon his *Oath of Calumny* is craved.

R. Ja. 1.  
Par. 9.  
Act 125.

*Oath in Litem.*

An *Oath in Litem*, is that which Law allows the Judg to defer to him who is injured; for proving the quantities of the thing wherein he is injured; V.G. If I pursue Titius for having broke up my Trunk, and I having proved that he did break it up, the Judg will refer to my Oath what I had in the Trunk; and this is allowed both in *Odium* of him who commits the Injury, and lest the Person unjustly injured should lose his Right for want of Probation.

A qualified Oath.

A *qualified Oath* is, that whereby he to whose Oath any thing is referred, depones, not simply, but *circumstantially*; which we call



call to depone with a quality; V. G. If I Tit. II. pursue Titius for payment of 100 lib. which he promised to pay, who compares and depones, That the Promise was conditional, and did depend upon something to be done or performed by the Pursuer, as that intuitue of the Promise, the Pursuer was to make over some Right to him, or discharge some Obligation or Right standing in his Person: and those qualified Oaths generally are admitted if the Quality be intrinick; that is to say, necessarily employed in the nature of the thing, or are a part of the Promise: As in the foresaid Instances.

But if the Quality be extrinick, it in effect resolves in a Defence, and so must be proven otherways than by the qualified Oath; as if a Debt be referred to a Party's Oath, who depones, that he acknowledges the Debt, but that the Pursuer is resting to the Deponent the equivalent Sum with which he would compensate the Sum pursued for: this will not be admitted as a Quality, but is in effect a Defence which must be proven otherways than by his Oath.

Probations by Witnesses, having been allowed in all Cases of old, until the falseness of Men forced our Law-givers to allow nothing above 100 lib. to be proven

Probation  
by Wit-  
nesses.

Book IV. without Writ or Oath, and Promises to be  
 ~~~~~ only proven by Oath; this Probation by  
 Witness is therefore called *Probatio prout  
 de jure*; and it is fit to know, that none  
 within Degrees *defendant*, that is to say,  
 who are *Cousin-germans*, or *nearer Rela-  
 tions*, can be Witnesses; nor *Women*, nor  
 Inhabile *Tenants who have not Tacks*, nor *Persons*  
 Witnesses. *declared Infamous*, nor *Domestick Ser-  
 vants*, nor such as *may gain or lose by the  
 Cause*, nor such as *have given partial  
 Counsel*, that is to say, *Advice to raise or  
 carry on the Pursuit*; nor such as *have sold  
 what they will depone*, which we call *pro-  
 dere testimonium*; nor such as *compear to  
 depone without being cited*, whom the  
 Law calls *Testes ultronios*, and rejects them  
*because of their suspected forwardness*:  
 All others except these may depone, and  
 are called *habile Witnesses*; and if *habile  
 Witnesses* refuse to come when they are  
 cited, there will be first *Horning*, and then  
*Caption directed against them*, which are  
 called first and second Diligences, but their  
*Escheats* will not fall upon that Horning.

Presump-  
 tions.

*Presumptions* are a kind of Probation,  
 and a *Presumption* is defined to be a *strong  
 Ground or Argument*, whereby a *Judge* has  
*reason to think or be convinced that such  
 a thing is true*; and they are divided into  
*Presum-*

*Prasumptiones juris*, which though they Tit. III.  
 be strong, yet may be taken off by a contrary Probation; as if a Man threaten to poison another, if the Person was thereafter poisoned, it is presumable that he was poisoned by the Threatner: and *Prasumptiones juris & de jure, ubi lex constituit super Prasumpto*; and thus the Law presumes, that an *ultronious* Witness, who offers himself, is *partial*, and therefore statutes upon that Presumption, that he shall not be received; and against these Presumptions, no Probation can be admitted.

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### TIT. III.

#### *Of Sentences, and their Execution.*

**A**FTER a Decreet is extracted, the Obtainer thereof raises Letters of *Horning thereon*; whereby the Party decerned is charged to pay or fulfil the will of the Decreet, under the pain of Rebellion; and this Decreet can only be quarrelled by *Reduction* or *Suspension*, in both which the Reasons whereupon it is quarrelled are set down: nor can a Decreet of the Lords be taken away without Reduction:  
 and

Book IV. and if there has been a Debate in the first Instance, (for so we call the Action before the Decreet, as we call *Reduction* and *Suspension* the second Instance) then nothing that was competent to have been proponed before the Decreet will be admitted, but will be repelled as *competent and omitted*; for else there should be no end of *Debate*: but yet if any thing have newly emerged, or has newly come to the Party's knowledg, these are and must be received, if he depone that *he knew not the same formerly*.

Suspension.

The ordinar effect of a *Suspension*, is to stop the Execution of Sentences for a time; and it is a *Summons*, wherein the Party alledged, injured by a Decreet, doth cite the Party who has obtained the Decreet before the Lords, (for no *inferiour Court* can suspend) to answer to the Reasons offered by him, for suspending Executions upon that Decreet: which Summons proceeds upon a Bill, wherein the *Reasons* are represented to the Lords; for though sometimes the Lords ordain the *Reasons* to be debated upon the Bill, yet ordinarily they ordain Letters of Suspension to be raised: If the Decrees be *in foro*, then the Suspension must pass by the whole Lords in time of *Session*, and by three Lords in  
† time

## and their Execution.

251

time of *Vacance*; but other Decretes may be suspended by any one Lord. Tit. III.

There are other Reasons allowed to be insisted on beside these in the Bill, and these are called *eiked Reasons*; and a Man may suspend upon new Reasons, as oft as he pleases, for competent and omitted is not received against *Suspension*. But if the Reason of Suspension be founded on Compensation; the same must be proponed in the first Instance, and before the Decreet be extracted \*, otherwise it will be repelled as competent and omitted. \* K. J. 6.  
Par. 12.

If the *Suspension* be called Discus'd, and the Letters found orderly proceeded, that is, ordained to be put to farther Execution: Then Letters of Caption may be raised; whereby all the *Inferiour Judges* and *Magistrates*, are ordained to concur with the Messenger in apprehending the Rebel, and putting him in Prison: which if they refuse, or if the Prisoner thereafter escape out of their Prison, they are liable to pay the Debt, by a *Subsidiary Action*. AG 141.

Decretes are executed likewise by *Poynding* and *Arrestment*, upon the Warrant in the Letters of Horning, which are fully treated in their proper places: *Vide supra*, Tit. *Poynding*, and *Arrestment*. Tit. 6. Book 3.

As

Book IV.



As to *Execution of immovable Goods*, which is by *Comprising and Adjudication*; the same is formerly treated, *Book 2. Tit. 12.*

If the Decreet be to *remove from Lands*, then the Party decerned to remove, being denounced Rebel, for not removing, the *Sheriff* or *Judg ordinar*, is charged to *Letters of eject*, who comes to the Land, and puts *Ejection. out the Fire*, or casts out some of the *Plenishing*: But if a Man continue to possess in spite of all Law after he is legally ejected, the *Privy Council* will give *Letters of Fire and Sword* to the Party injured; commissionating the *Sheriff* and others whom he will name, to *dispossess him by the Sword*, to raise Fire, and use all other Severities; for which the Commission does indemnify them.

Decrees  
Arbitral.

If such as have *debateable Rights*, choose rather an *Amicable*, than a *Judicial Decision*, they subscribe a *Submission to Arbiters*, and if they please, to an *Overfman*, and another *Blank* on the back of the *Submission*; wherein they may fill in their *Decreet Arbitral*: And though it be free to these *Arbiters* to accept, yet if they once accept, the *Lords will grant Letters of Harning to force them to decide.*

Though

Though these *Arbiters* are not tied to *Tit. III.* the strict *Solemnities of Law*, yet they must observe *material Justice*; and therefore they must *advertise Parties, that they may give in Claims*, (for a *Claim to Arbiters* is in place of *Libels to Judges*) and must allow *Terms to prove*: And though *Equity* is to them a *Rule*, as *Law* is to other *Judges*; yet if either *Party* be enormously lesed, the *Lords* will suspend and reduce their *Decrets*. If the *Submission* bear no special *Day betwixt*, and which they are tied to decide, they must decide within a *Year* of the *Submission*; and if *Witnesses* will not voluntarily appear before them, the *Lords* will upon a *Bill* grant *Letters of Horning* to force them to appear, as they will against the *Arbiters* themselves; if they refuse or delay to decide, and to give forth their *Decreet Arbitral*.

Another ordinary way now used is, that the one *Party* grants a blank *Band*, and the other a blank *Discharge*, to be filled up by the *Arbiters*, without any *Submission*.

## T I T. IV.

## Of Crimes.

Crimes.

**C**RIMES are either Private, where the Injury is committed against *Private Persons*; or Publick, where it is committed immediately against the *Commonwealth*.

Delicta.

*Private Crimes*, called also *Delicta* in the *Civil Law*, oblige the Committers to repair the Damage and Interest of the private Party.

*Crimes* are in *Scotland* either punished Capitally, by Death; or Pecunially, by a certain Fine; or Arbitrarily, at the Discretion of the Judge.

*Capital Crimes are,*

Treason.

*Treason*, which is punished by *Forfeiture of Life, Lands, and Goods*.

\* K. J. 2.

Par. 6.

A&amp; 24.

K. C. 2.

Par. 1.

Sess. 2.

A&amp; 12.

† K. C. 2.

Par. 3.

A&amp; 2.

*It is Treason in any Man to plot, contrive or intend Death or Destruction to the King's Majesty; or to lay any Restraint upon his Royal Person; or to deprive, depose or suspend him \*; or to endeavour the Alteration or Diversion of the Succession †; to levy War against the King;*



King, or any Commissionated by him ; or  
to incite others to invade him \* ; to make \* Par. 1.  
Treaties or Leagues with Foreign Princes, Sess. 2.  
or amongst themselves without his consent †. † K. C. 2.  
To rise in fear of War against the King ; Par. 1.  
to raise a Frey in his Hoast || ; to Affail Sess. 1.  
Castles where he resides \* ; to impugn the Act 3. R. 3.  
Authority of the three Estates ; to decline || K. J. 2.  
the King's Authority, not to come out to Par. 12.  
the King's Hoast, or to desert it † ; to Act 54.  
maintain or setle Traitors || ; to conceal K. J. 2.  
Treason ; to counterfeit the King's Coin ; Par. 6.  
and to raise wilful Fire \* ; all which are Act 24.  
Species of High Treason. \* K. J. 6.  
Par. 8.

We have a kind of Treason in Scotland Act 129,  
which we call † Statutory Treason, and 130.  
because it is meerly introduced by Statute, † K. Ja. 1.  
and not by Common-Law ; viz. Theft in Par. 1.  
landed Men || , because of the Danger of Act 4.  
that kind of Theft ; Murder under K. Ja. 2.  
trust \* ; as if one Man should kill ano- Par. 6.  
ther, when he invites him to his House ; Act 24.  
or a Tutor should kill his Pupil, which K. J. 2.  
because of the easiness and atrociousness Par. 2.  
of the Crime is made Treason. The Act 28.  
firing of Coal Heughs †, Assassination || , || Act 97.  
and the pursuing another for Treason with Par. 7.  
† Stat. \* K. Ja. 5.  
out Treason. Par. 3.  
|| K. Ja. 6. Act 8.

Par. 11. Act 50. \* Ibid. Act 51. † K. Ja. 6. Par. 12.  
Act 146. || K. C. 2. Par. 3. Act 13.

Book IV. out being able to prove it \*. *All Jesuits, Seminary-Priests, and Trafficking Papists* † ;  
 \* K. Ja. 6. and all Thieves, who take Bonds from leal  
 Par. 11. and honest Men ; for re-entering when  
 Act 49. they please : All who purchase Benefices at  
 † K. J. 6. Rome, are guilty of Treason ||.

Par. 12.  
 Act 120.

|| K. J. 5.

Par. 7.

Act 125.

K. J. 6.

Par. 6.

Act 69.

No Crime can be pursued against a Man or his Heirs after his Death ; except that *Treason* which is committed against the *King's Person* or *Common-wealth*.

A *Traitor* being forefaulted, not only all the Lands he holds of the *King*, but all the Lands he holds of any other Superiour fall to the *King* ; because the Crime is committed against him. But because the *King* cannot hold Lands of any other Superiour : therefore he does by a Letter of Presentation under the *Quarter Seal*, present a Donatar to the Superiour, who is to be Vassal to the Superiour, in place of the Person forefaulted : And this method of Presentation the *King* uses also in the Cases of Bastardy and *ultrimus heres*.

Not only the Lands disposed to the Person forefaulted, but all the Lands disposed to Sub-vassals, who are not confirmed, fall to the *King* ; for the Lands return to the *King* in the same condition they

they were disposed by his Majesty, or his Predecessors, without being burdened with any Right except these to which he has consented: Nor is the King obliged to acknowledge Tacks, though made and clothed with Possession before committing of the Crime, except the Tack be set for a suitable Tack-duty. The King is obliged to pay no Debt, though contracted for onerous Causes, before the committing of the Crime; except the Creditor have a real Security, therefore confirmed before the Crime was committed.

The other Capital Crimes are *Blasphemy*, *Man-slaughter*, or *Homicide*; for all *Homicide is Capital with us*, except it be *Casual*\*, or *Homicide in Self-defence*.

† *Theft* is punishable by Death; but we call small *Theft Pickery*, and it is only punishable *arbitrarily* ||.

Notour *Adultery*, that is to say, where there are Children of the Marriage, or where the Adulterers converse openly at Bed and Board, or being discharged by the Church to converse, do continue to converse, is punishable by Death\*; but simple *Adultery* is only punishable *arbitrarily*. *Incest*\*, *Buggery*, *Duels* †, the invading of any of His Majesty's Officers, for doing His

S

Majesty's

Tit. IV.

\* R. C. 2.

Par. 1.

Sess. 1.

Act 22.

† R. J. 1.

Par. 13.

Act 137.

& 14.

|| R. J. 3.

Par. 7.

Act 60.

\* Q. M.

Par. 9.

Act 74.

R. Ja. 6.

Par. 6.

Acts 105.

† R. Ja. 6.

Par. 1.

Act 14.

Book IV. Majesty's Service \*; Forgery †; Witch-  
craft, and the Consulters of Witches ||  
\* K. J. 6. Sorner's, that is to say, such as master-  
Par. 16. fully take Meat and Drink from the King;  
A 8. 12. People without Payment \*: All misfel-  
† K. J. 6. leasers of Mass †, and Concealers of the  
Par. 16. same; Mutilation ||, which is the dis-  
A 8. 4. bling of a Member, though de pravi;  
|| K. J. 4. this be ordinarily punished with an ar-  
Par. 6. bitrary Punishment: Or the Authors of  
A 8. 8. Infamous Libels, Seditious Speeches tend-  
\* Q. Mary ing to Sedition; the Strikers of any  
A 8. 22. Judge in Judgment; Mixers of Wine †,  
Par. 7. and Committers of Flame-sucken, by which  
† Q. Mary we understand the assaulting or beating  
Par. 9. any Man in his House.  
A 8. 73. The Crimes to be pecuniarily punished,  
|| K. J. 1. are the Slayers of Red-Fish †, Killers of  
Par. 1. Does, Deer, Roes. ||; Destroyers of Bee-  
A 8. 5 & 7. hives, Fruit-trees, Green-Wood; Kind-  
\* K. J. 3. lers of Mure-burn, except in the Month  
Par. 10. of March; Steeping of green Lint in  
A 8. 71. running Waters, or Loches; such as are  
† K. J. 6. guilty of Abominable Oaths, and For-  
Par. 14. nication.  
A 8. 193. \* K. J. 3.  
|| K. J. 6. Par. 12.  
Par. 6. A 8. 89. † K. J. 1. Par. 1. A 8. 19. || K. J. 1. Par. 1.  
A 8. 76. A 8. 1. and A 8. 16. Par. 14. A 8. 10.

Crimes

\*

Crimes to be arbitrarily punished at the Discretion of the Judge, are Negligence in the King's Judges and Officers \*, and such as unjustly murder against them †, breakers of the King's Protection †, the bringing home of Erroneous Books \*, and the troublers of Church-Men; Crafts-Men who wrongously refuse to fulfil the Work which they have taken in hand †; Verbal Injuries and Scandals against private Parties.

It is fit to know that no Punishment left Arbitrary by the Law to the Discretion of the Judge, can be by him extended to Death; and that where-ever the Law appoints Death to be inflicted, the Offender's Moveables fall to the King, tho the Law does not express the same, and tho the Sentence express not the Confiscation.

There are other Crimes whereof the Punishment is not reducible to any of these kinds; and thus Perjury and Bigamy, (which is a kind of Perjury, because a Man who marries two Wives breaks his Matrimonial Oath) are punishable by Confiscation \* of all the Offenders Moveable Goods, Imprisonment, and Infamy.

Deforcers of Messengers, and breakers of Arrestment, are punishable by Confiscation

Tit. IV.  
\* H. J. 2.  
Par. 11.  
Act 76.  
† H. J. 3.  
Par. 7.  
Act 104.  
† K. J. 1.  
Par. 11.  
Act 124.  
\* K. J. 6.  
Par. 7.  
Act 106.  
† K. J. 1.  
Par. 5.  
Act 80.  
K. J. 5.  
Par. 7.  
Act 111.  
\* Q. Mary  
Par. 5.  
Act 14.

- Book IV. cation of all their Moveables \*, *Fore-  
stallers of Mercats* †, by buying things be-  
\* K. J. 6. fore they be presented to the Mercat; or  
Par. 7. before the Mercat be proclaimed, are pu-  
Act 118. nishable by Imprisonment, and Confisca-  
Par. 12. tion of what is bought.  
Act 150.  
† Ibid. *Ocker*, or *Usury* ||, which is the taking  
Act 48. more than the Annual Rent allowed, or  
|| K. J. 6. the taking Annual Rent before the term  
Par. 11. of Payment, is punished by loss of the  
Act 52. principal Sum; for the Debitor is to be  
Par. 14. free from the Obligation, and the Writ  
Act 222. being reduced, the Sum belongs to His  
Par. 15. Majesty.  
Act 257. *Stellionat*, or the making of double  
\* K. Ja. 5. Rights, is punished by Infamy \*, and their  
Par. 7. Persons are at the King's Will.  
Act 15. *The Keepers of Victual to a Dearth* are  
K. J. 6. punishable, as † *Ockerers*; and by the  
Par. 12. *Civil Law*, per leg. *Jul. de Annona*.  
Act 141. Bribing of Judges is punishable by Infamy  
† K. J. 2. and Deprivation. *Plagium*, or the steal-  
Par. 6. ing of Men, is a particular Crime by the  
Act 22. *Civil Law*; but is a Species of Theft with  
K. J. 6. us. And *Theftboot*, which is the saving a  
Par. 13. Thief by syning with him, is punishable  
Act 137. as *Theft* ||. *Baratry*, or the obtaining  
\* K. Ja. 6. Benefices from Rome, is punishable by  
Par. 11. \* Banishment and Infamy. *Ambitus*, or  
Act 2. the obtaining Offices by unjust Means, is  
Par. 6. not punishable under Monarchy. By  
Act 72.

By our Law, when the Pursuer raises a *Criminal Summons*, he must find Caution to report the *Criminal Letters* indors'd and execute; and the Cautioner must either enact himself in the Books of *Ad-journal*, (for so we call the Registers of the *Justiciary*) if he be present; or he must send a Band to be registrate there, if he be absent, under the Pains contained in the Act of Parliament\*: And the Defender is by the Letters commanded to find Caution in the saids Books, within six Days after the saids Letters are execute against him; which finding of Caution, he must intimate to the Messenger who cites him, else that Messenger may denounce him for not finding Caution.

\* K. Ja. 5.

Par. 4.

Act 34.

The Defender in all Crimes is allowed to have *Letters of Exculpation*, for leading Witnesses for proving of his own Innocency, which he must raise and execute against the Day of Compearance, to which he himself is cited; for all Diets in Criminal Courts are peremptor. And there are no Diets allowed for farther Probation, either to Pursuer or Defender.

All Probation in Criminal Causes must be very convincing and clear, because of the severity of the Conclusion: But yet sometimes Witnesses otherwise *inhabile*,

Book IV. are allowed, because of the Danger of the Common-Wealth, as in Treason, or because the Crime cannot be otherwise proven, as in *Hamesucken*.

The Justices are the only Judges to all Points of Relevancies, and even to the Objections against the Witnesses; and they remit to an *Inquest* of 15 chosen Men out of 47, to judge what is proven: And this *Inquest* may condemn upon their own Knowledge, they being in our Law both Judges and Witnesses: And if they condemn, *Their Verdict* (for so their Sentence is called) cannot be quarrelled, nor they for Condemning; but if they absolve after clear Probation led, they may be punished with Infamy, and Confiscation of Moveables.

The Punishment of Crimes is taken off either by *Remission*, which must pass the *Great Seal*, and must express the greatest Crime\*, for which the *Remission* is granted; or, by *Indemnities*, which is a general *Remission* granted by the King or Parliament; betwixt which two there is this difference, that the obtaining a *Remission* does not free the Obtainer from \* *assyching the Party*, (that is to say, from repairing his Losses) since it's presumed the King does only discharge what belonged

\* K. Ja. 4.  
Par. 6.  
Act 62.

\* K. J. 2.  
Par. 14.  
Act. 74.  
K. J. 5.  
Par. 3.  
Act 7.



to him, which is *Vindicta Publica*; but Tit. IV. not what is the interest of private Parties, or *vindicta Privata*. But because all the People are represented in Parliament, the King and Parliament may by their *Edictum* discharge both the one and the other.

He who founds on a *Remission*, acknowledges the Crime; but he who founds on an *Indemnity*, does not.

The King likewise restores Men sometimes against *Foresaultures*; which *Restitution* is either by way of Justice, finding that the Person was unjustly condemned, and then the Person condemned is restored to all that ever he had; and he recovers not only his Fame, but his Estate, though transmitted to third Parties \*. Or, Secondly, the *Restitution* is by way of Grace and meer Favour; and then the Party condemned cannot recover what was bestowed by the King upon third Parties; for the King cannot recal what was once legally and warrantably granted to him.

\* R. J. 6.

Par. 18.

Act 4.

E I N I S.

# An Explanation of the most difficult Scots Words in the foregoing Treatise.

## A

|                          |   |
|--------------------------|---|
| <b>A</b> <i>Accress,</i> | Accrue.                                     |
| <i>Aded in Books,</i>    | Enrolled or Registered.                     |
| <i>Addebted,</i>         | Owing,                                      |
| <i>Adminicles,</i>       | Proofs or Supporters.                       |
| <i>Advert,</i>           | Take heed.                                  |
| <i>Advocate,</i>         | Counsellor at Law.                          |
| <i>Aliment,</i>          | Maintenance.                                |
| <i>To Aliment,</i>       | To maintain, or diet.                       |
| <i>Annual Rent,</i>      | Interest.                                   |
| <i>Appearand,</i>        | Apparent.                                   |
| <i>Apprising,</i>        | The adjudging of an Estate<br>to pay Debts. |
| <i>Ascribe,</i>          | Ascribe.                                    |
| <i>Affoilzed,</i>        | Acquitted.                                  |
| <i>Avail,</i>            | Value.                                      |

## B

|                             |                                    |
|-----------------------------|------------------------------------|
| <b>B</b> <i>Ackband,</i>    | Counterband.                       |
| <i>Bailie,</i>              | Bailiff.                           |
| <i>Bairns,</i>              | Children.                          |
| <i>Bairns part of Gear,</i> | A Child's Portion.                 |
| <i>Band,</i>                | Bond.                              |
| <i>Bloodwits,</i>           | Drawing of Blood in Quar-<br>rels. |

\*

*Boll,*

# *An Explanation of Scots Words.*

|                            |  |
|----------------------------|--|
| <i>Boll,</i>               | Four Bushels.  |
| <i>Bruiik,</i>             | Enjoy.   |
| <i>Burfers,</i>            | Poor Scholars.   |
| <i>Bygone,</i>             | Bypass.  |
| <b>C</b> <i>Aption,</i>    | A Writ for taking a Man.                                   |
| <i>Casualties,</i>         | Rights or Perquisites due to those of whom Lands are held. |
| <i>Caution,</i>            | Security.  |
| <i>Cautioner,</i>          | Bondsmen.  |
| <i>Cedent,</i>             | He that makes a Grant.                                     |
| <i>Chamberlain,</i>        | Stewart.   |
| <i>Chamberlain-Court,</i>  | Stewart's Court.   |
| <i>Chancery,</i>           | Chancery.  |
| <i>Coalheugh,</i>          | Coal-mine.   |
| <i>Cognition,</i>          | Cognizance.  |
| <i>Cognosce upon,</i>      | Take Cognizance of.  |
| <i>College of Justice,</i> | Inns of Court.   |
| <i>Collusion,</i>          | Underhand Agreement.                                       |
| <i>Commissar,</i>          | Official, or he who holds the shops Courts.                |
| <i>Compears,</i>           | Appears.   |
| <i>Conductor,</i>          | Hirer.   |
| <i>Conquest,</i>           | Purchas'd.   |
| <i>Consignatar,</i>        | A Consigner, he that consigns.                             |
| <i>Crop,</i>               | Corn.  |

*Dues,*

# *An Explanation of Scots Words.*

## **D**

|                             |   |
|-----------------------------|---|
| <b>D</b> <i>Des,</i>        | Does.                                     |
| <b>D</b> <i>Deserved,</i>   | Decreed, or Impower'd.                    |
| <b>D</b> <i>Declarator,</i> | A sort of Declaration in Law.             |
| <b>D</b> <i>Decreet,</i>    | Decree or Sentence.                       |
| <b>D</b> <i>Deforce,</i>    | To oblige one to desist by force.         |
| <b>D</b> <i>Defunct,</i>    | Deceas'd.                                 |
| <b>D</b> <i>Denuded,</i>    | Divested.                                 |
| <b>D</b> <i>Deputat,</i>    | Deputies.                                 |
| <b>D</b> <i>Desuetude,</i>  | Disuse.                                   |
| <b>D</b> <i>Diet,</i>       | Time of appearance before a Court.        |
| <b>D</b> <i>Delugent,</i>   | Putting of a Legal Sentence in Execution. |
| <b>D</b> <i>Discontigu,</i> | Separated.                                |
| <b>D</b> <i>Dispan'd,</i>   | Assign'd.                                 |
| <b>D</b> <i>Districke,</i>  | Disticks.                                 |
| <b>D</b> <i>Dinet,</i>      | Green Turf for covering Houles.           |
| <b>D</b> <i>Dole,</i>       | Deceit.                                   |
| <b>D</b> <i>Donat ar,</i>   | Donor.                                    |
| <b>D</b> <i>Doted,</i>      | Endowed.                                  |

## **E**

|                           |                            |
|---------------------------|----------------------------|
| <b>E</b> <i>Efsiring,</i> | Conform or proportionable. |
| <b>E</b> <i>Eike,</i>     | An Addition.               |
| <b>E</b> <i>Elicitor,</i> | Solicitor or Procurer.     |
| <b>E</b> <i>Emption,</i>  | Buying.                    |
| <b>E</b> <i>Enormly,</i>  | Irregularly, Exceedingly.  |
| <b>E</b> <i>Escheat,</i>  | Forfeiture.                |

*Evid,*

# *An Explanation of Scots Words.*

|                          |   |
|--------------------------|---|
| <i>Evilt,</i>            | Affect or destroy.  |
| <i>Evidents,</i>         | Evidences.  |
| <i>Evite,</i>            | Avoid.  |
| <i>Extambion,</i>        | Exchange of one thing for another.                                  |
| <i>Exerce,</i>           | Exercise.   |
| <b>F</b>                 |   |
| <i>Falking,</i>          | Failing.  |
| <i>Fang,</i>             | Taken in the Fact.  |
| <i>Feal,</i>             | Green Turf for Hedging or Inclosures.                               |
| <i>Fear of War,</i>      | Warlike Posture.  |
| <i>To Fence a Court,</i> | To hold a Court in the usual Formalities as in the King's Name, &c. |
| <i>Ferne,</i>            | Corn or Meal paid to the Landlord for Rent.                         |
| <i>Fisk,</i>             | Exchequer.  |
| <i>Foggage,</i>          | Grass which grows after the mowing of Hay.                          |
| <i>Forefaulture,</i>     | Forfeiture.   |
| <i>Fortilace,</i>        | A small Fort.   |
| <i>Frey,</i>             | False Alarm or Tumult.  |
| <b>G</b>                 |   |
| <i>Leibe,</i>            | Land belonging to the Minister of each Parish.                      |
| <b>G</b>                 |   |
| <i>Goods,</i>            | Cattle.   |
| <b>H</b>                 |   |
| <i>Abile,</i>            | Able.   |
| <i>Heritable,</i>        | Hereditary.   |
|                          | <i>Heretor,</i>   |

# *An Explanation of Scots Words.*

|                      |              |
|----------------------|--------------|
| <i>Heritor,</i>      | Freeholder.  |
| <i>Heretrix,</i>     | Heirefs.     |
| <i>Heritage,</i>     | Inheritance. |
| <i>Hlaft,</i>        | Army.        |
| <i>Horning,</i>      | Outlawry.    |
| <i>Hounding out,</i> | Setting on.  |

|                         |                               |
|-------------------------|-------------------------------|
| <b>I</b> <i>Dist,</i>   | Fool.                         |
| <i>Imprestable,</i>     | Not to be performed.          |
| <i>Inest,</i>           | Having a legal Right.         |
| <i>Intend,</i>          | Formed.                       |
| <i>Interdiction,</i>    | A divesting one of his Power. |
| <i>Intrometters,</i>    | Those who intermeddle.        |
| <i>Intromission,</i>    | Intermeddling.                |
| <i>Inuitue,</i>         | With regard or respect to.    |
| <i>Joyssing,</i>        | Enjoying.                     |
| <i>Justice General.</i> | Lord Chief Justice.           |

|                        |                               |
|------------------------|-------------------------------|
| <b>K</b>               |                               |
| <b>K</b> <i>Enned,</i> | Known.                        |
| <i>Kill'd,</i>         | The drying of Corn on a Kiln. |

|                           |                         |
|---------------------------|-------------------------|
| <b>L</b>                  |                         |
| <b>L</b> <i>Aberrows,</i> | A binding to the Peace. |
| <i>Les'd,</i>             | Injur'd.                |
| <i>Leal,</i>              | Honest.                 |
| <i>Legatar,</i>           | Legatee.                |
| <i>Label,</i>             | Indite or Indictment.   |
| <i>He Libels,</i>         | He informs or says.     |
| <i>Life-rent,</i>         | An Annuity for Life.    |
| <i>Lin,</i>               | Flax.                   |

*Liquid,*

# *An Explanation of Scots Words.*

|                          |  |
|--------------------------|--|
| <i>Liquid,</i>           | <i>Fix'd, ascertain'd</i>                    |
| <i>Loches,</i>           | <i>Lakes.</i>                                |
| <i>Lords of Session,</i> | <i>Judges.</i>                               |
| <i>M</i>                 |  |
| <i>Alversation,</i>      | <i>Misbehaviour.</i>                         |
| <i>Manse,</i>            | <i>Minister's House.</i>                     |
| <i>Meal,</i>             | <i>Rent.</i>                                 |
| <i>Modified,</i>         | <i>Regulated, ascertained.</i>               |
| <i>Moor,</i>             | <i>Heath.</i>                                |
| <i>Multur,</i>           | <i>Toll paid for grinding to the Millar.</i> |
| <i>Mureburn,</i>         | <i>Burning of Heath.</i>                     |
| <i>N</i>                 |  |
| <i>Imious,</i>           | <i>Too much.</i>                             |
| <i>Notar,</i>            | <i>Notary.</i>                               |
| <i>Notor,</i>            | <i>Known.</i>                                |
| <i>O</i>                 |  |
| <i>Nerous,</i>           | <i>Weighty.</i>                              |
| <i>Owand,</i>            | <i>Owing.</i>                                |
| <i>P</i>                 |  |
| <i>Peremptor,</i>        | <i>Peremptory, fix'd.</i>                    |
| <i>Plenishing,</i>       | <i>Household Furniture.</i>                  |
| <i>Poynding,</i>         | <i>Distraining or Seizing.</i>               |
| <i>Prescrive,</i>        | <i>Prescribe.</i>                            |
| <i>Procedour,</i>        | <i>Procedure, Process, or Trial at Law.</i>  |
| <i>Process,</i>          | <i>Law-suit.</i>                             |
| <i>Propone,</i>          | <i>Propose.</i>                              |
| <i>Pupils.</i>           | <i>Minors.</i>                               |
|                          | <i>Rata,</i>                                 |

# *An Explanation of Scots Words.*

**R**

**R** *At a,*  
*Recognosce to a*  
*Superiour,*

*Regality,*  
*Relaxation,*  
*Relevancies,*  
*Relevant,*  
*Relict,*  
*Repledg,*  
*Repons,*  
*Reprobate,*  
*Refile,*  
*Restand,*  
*Rouped,*  
*Rowming,*

**S**

**S** *Effion,*  
*Signet,*  
*Sketchless,*  
*Sawm,*  
*Spendebriſt,*  
*Spylie,*  
*Scipend,*  
*Subscribe,*  
*Summar,*

*Summonſes,*  
*Three Suns,*

**A Proportion.**

**Return to a Superiour.**

**Royalty.**

**Releasing or acquitting.**

**Sufficiency ſatisfactory.**

**Sufficient.**

**Widow.**

**Replevy.**

**Reſtore.**

**Rejeſt or Condemn.**

**Retract or go back from.**

**Reſting.**

**Sold by way of Auction.**

**Aſſigning of a place for Cat-  
tel to feed on.**

**Term.**

**King's Seal.**

**Free from Damage.**

**A Horſe or Cow's Graſs.**

**An Ill Husband, a Prodigal.**

**Waſte or Devaſtation.**

**Benefice.**

**Subscribe or Sign.**

**Short, or without the uſual  
form of Law.**

**Summons.**

**Three Days.**

**Tabled,**



# An Explanation of Scots Words.

T

|                |   |
|----------------|---|
| <b>T</b> Able, | Laid before.                                      |
| Taciturnity,   | Silence.  |
| Tacks,         | Leases.   |
| Tacksmen,      | Lessee.   |
| Tailzie,       | Entail.   |
| Teand Bear,    | Tithe Barley.                                     |
| Teinds,        | Tithes.   |
| Testament,     | Will.   |
| Theasurer,     | Treasurer.  |
| Thefaury,      | Treasury.   |
| Thirl,         | To be obliged to grind at<br>such or such a Mill. |
| Thirlage,      | Such an Obligation.                               |
| Thole,         | Endure.   |
| Tocher,        | Wife's Portion.                                   |
| Transumps,     | Transcripts.                                      |
| Tutor,         | Guardian.   |

V

|                |   |
|----------------|---|
| <b>V</b> Aiks, | Is Vacant.  |
| Vassal,        | One who holds Land from a<br>Superiour in Feu, or on<br>condition of such and such<br>Services. |
| Vendition,     | Selling.  |
| Victual,       | Corn, Meal, and Malt.   |
| Uplift,        | Collect.  |

W

|                         |           |
|-------------------------|-----------|
| <b>W</b> Adset, Wedset, | Mortgage. |
| Wrongs,                 | Wrongful. |
| F I N I S.              |           |